IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-5706

CHARLES WILLIAM PROFFITT,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR PETITIONER

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OPINIONS BELOW

The opinion of the Supreme Court of Florida affirming Petitioner's conviction of first degree murder and sentence of death by electrocution is reported at 315 So.2d 461 (Fla. 1975). The written decision of the Circuit Court of the Thirteenth Circuit in and for Hillsborough County, Florida, adjudicating Petitioner guilty and sentencing him to die is unreported.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. §1257(3), the Petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

The judgment of the Supreme Court of Florida was filed on May 28, 1975. The Petition for Rehearing was denied and the Mandate was final on August 13, 1975. The Petition for Certiorari was filed on November 5, 1975, and was granted on January 22, 1976.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted."

This case also involves the Due Process Clause of the Fourteenth Amendment, which provides:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ."

It further involves the following provisions of Florida Statutes Annotated:

Fla. Stat. Ann. § 775.082 (1973)
Penalties for felonies and misdemeanors

"(1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than twenty-five (25) calendar years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in

section 921.141 results in findings by the Court that such person shall be punished by death, and in the latter event such person shall be punished by death.

(2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, a person convicted of a capital felony shall be punished by life imprisonment as provided in subsection (1).

(3) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1). . . ."

Fla. Stat. Ann. § 782.04 (1973)[1]
Murder

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[1]This section was amended in 1974, and the statutory definition of second degree murder was altered slightly. Florida Laws 1974 c.74-383, §14 (effective July 1, 1975) enacts a new §782.04, which provides:

> *782.04 Murder*
> (1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of or in the attempt to perpetrate any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person eighteen years or older when such drug

(continued)

"(1) (a) The unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in

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(footnote continued from preceding page)

is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in chapter 775.

(b) In all cases under this section the procedure set forth in §921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in chapter 775.

(3) When a person is killed in the perpetration of, or in the attempt to perpetrate, any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony shall be guilty of murder in the second degree, which constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in chapter 775.

(4) The unlawful killing of a human being when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in chapter 775."

the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen years when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in §775.082.

(b) In all cases under this section, the procedure set forth in section 921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) When perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, or when committed in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, except as provided in subsection (1), it shall be murder in the second degree, . . . punishable by imprisonment in the state prison for life or for such term of years as may be determined by the court.

(3) When perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, it shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in section 775.082."

Fla.Stat.Ann. §*921.141 (1973)*[2]

Sentence of death or life imprisonment for capital felonies; further preceedings to determine sentence

"(1) *Separate proceedings on issue of penalty.* Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by section 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before the jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsection (6) and (7), of this section.[3]

Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured

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[2]Subsection (1) of this statute was amended slightly in 1974 by Fla. Laws 1974, c.74-379 (effective October 1, 1974) to provide that if through "impossibility or inability," the trial jury is unable to reconvene for a hearing or sentencing, a special jury may be summoned.

[3]The subjection setting forth aggravating circumstances and mitigating circumstances in Fla.Stat.Ann. §921.141 (1975-1976 Supp.) however, are numbered respectively, (5) and (6).

in violation of the Constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) *Advisory sentence by the jury.* After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life . . . or death.

(3) *Findings in support of sentence of death.* Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsection (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court

shall impose sentence of life imprisonment in accordance with section 775.082.

(4) *Review of judgment and sentence.* The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) *Aggravating circumstances.*—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious or cruel.

(6) *Mitigating circumstances.*—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant, at the time of the crime."

Fla. Stat. Ann. §*922.09 (1973)*
Capital cases

"When a person is sentenced to death, the clerk of the court shall prepare a certified copy of the record of the conviction and sentence, and the sheriff shall send the record to the governor. The sentence shall not be executed until the governor issues a warrant, attaches it to the copy of the record, and transmits it to the warden, directing

him to execute the sentence at a time designated in the warrant."

Fla. Stat. Ann. §922.10 (1973)
Execution of death sentence.

"A death sentence shall be executed by electrocution. The warden of the state prison shall designate the executioner. The warrant authorizing the execution shall be read to the convicted person immediately before execution."

Fla. Stat. Ann. §922.11 (1973)
Regulation of execution

"(1) The warden of the state prison or a deputy designated by him shall be present at the execution. The warden shall set the day for the execution within the week designated by the governor in the warrant.

(2) Twelve citizens selected by the warden shall witness the execution. A qualified physician shall be present and announce when death has been inflicted. Counsel for the convicted person and ministers of the gospel requested by the convicted person may be present. Representatives of news media may be present under regulations approved by the head of the department of general services. All other persons except prison officials and guards shall be excluded during the execution.

(3) The body of the executed person shall be prepared for burial and, if requested, delivered at the prison gates to relatives of the deceased. If the body is not claimed by relatives, it shall be given to physicians who have requested it for dissection or be disposed of in the same manner as are bodies of prisoners dying in the state prison."

QUESTION PRESENTED

Does the imposition and carrying out of the sentence of death for the crime of first degree murder under the law of Florida violate the Eighth or Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

Following a jury trial in the Circuit Court for Hillsborough County, Petitioner, CHARLES WILLIAM PROFFITT, a 28-year old indigent white man, was convicted of the murder of JOEL MEDGEBOW. A separate sentencing proceeding concluded with the recommendation by a majority of the jury that the death penalty be imposed. (R42,535) On March 21, 1974, Petitioner was sentenced by the trial judge to death by electrocution. (R60-61)

Dr. Robert Charles Hutchinson was qualified as an expert in pathology over defense counsel's objection (R225) and testified that he performed an autopsy on the body of the decedent. The doctor stated his opinion that death was caused by acute shock (R229) resulting from bleeding (R230) caused by a stab wound seven centimeters deep into the pericardium and the heart. (R226-228)

Patricia Kay Medgebow, Joel's widow, was at his apartment on 115 South Lois on July 9, 1973, and went to bed about ten o'clock that night. (R248-249) She woke up about quarter of five the next morning at the sound of a moan and saw her husband propped up on one elbow, holding what turned out to be a knife.

Suddenly a man jumped up, hit her three times in the face and fled. (R250, 251)

Mrs. Medgebow called the police. (R252) Each of the first two people she talked to listened to her story, then switched her to another line. (R261) She pulled Joel to the floor to better give him artificial respiration and cardiac massage. (R252) Then she went to an apartment across the hall to get a friend. (R252)

She noticed that the sliding glass door was open when she awoke, and believed that it was closed when she went to bed. (R252) Her assailant was a white male with light brown hair wearing a white pin-striped shirt with long sleeves rolled up and the tail out over a pair of grey or khaki trousers. (R255) The prosecutor asked Mrs. Medgebow to "look around the courtroom and see if you can recognize the person that struck you" and she replied "No, I don't see anyone." (R254)

On cross-examination, Mrs. Medgebow testified that she had been separated from her husband for two months and had visited apartment 104 on about five occasions after the separation. (R258) On account of artificial lights in the parking lot and on the wall of the apartment building, "It was quite a bit of light in there." (R260) Her assailant's shirt did not have a Maas Brothers' Department Store emblem. (R262) Defense counsel brought out discrepancies between Mrs. Medgebow's trial testimony and testimony she had given on deposition as to the intruder's physical characteristics, including the color and thickness of his hair and the size of his nose. (263-266)

Mrs. Medgebow testified that she had smoked a joint of marijuana earlier the evening of July 9, 1973, but had shared the "joint between five people." (R268) Defense counsel sought to inquire as to any connection

between the decedent's use of drugs and his death, but the prosecutor's objection was sustained, and the trial judge instructed the jury to disregard the question. (R268-269)

Ben Stinson, who lived in apartment 102 across from Joel Medgebow (R272), was awakened by Mrs. Medgebow on the morning of July 10, 1973. (R273) He went through the opening left by the sliding glass door in search of the malefactor but found nobody. (R274) The apartment had not been ransacked. (R276)

Johnny E. Perkins, a Tampa police corporal, (R278) arrived at the Medgebow apartment the morning of July 10, 1973, in response to a call. (R279) The sliding glass door was bent slightly and scratched. (R284,285) Mr. Perkins identified the knife marked state's exhibit number nine as the one he had taken from the apartment to the property room of the Tampa Police Department. (R287)

During cross-examination Perkins noted that Mr. Medgebow's watch, a stereo component set, and forty or fifty dollars in a living-room ashtray were in plain sight and were undisturbed. (R292-293) He also found $142.00 cash in the pocket of Mr. Medgebow's blue jeans. (R293) Defense counsel asked whether Mr. Perkins found "any contraband in the apartment" (R296), but the prosecutor's objection to this question was sustained. (R298)[4]

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[4]Defense counsel sought to prove that there was present in the apartment a large quantity of marijuana. He believed the large amounts of money and marijuana in the apartment provided a motive for the death of Joel Medgebow. However, the trial judge agreed with the prosecution that there was "absolutely no connection in this case between marijuana and the death of Joel Ronnie Medgbow." (R296-297)

Stephen A. Moore, an identification technician with the Tampa Police Department, went to apartment number 104 at 115 South Lois on July 10, 1973. (R231) Mr. Moore lifted five fingerprints from a sliding glass door, four "on the inside and one . . . off the door handle on the outside." (R234)

Burt Madix, another identification expert with the Tampa Police (R237) was qualified as an expert as to fingerprint identification, without objection. (R238) On July 17, 1973, he examined the fingerprints taken from the apartment (R239) and determined that one and possibly another were clear enough for comparison purposes. (R240) Neither of the dicipherable fingerprints matched the Petitioner's fingerprints. (R242-243)

Larry Roy Gedesse, a co-worker with Petitioner at Maas Brothers (R302) left work about seven or seven thirty o'clock the evening of July 9, 1973, at the same time as the Petitioner. (R303) The Petitioner was driving a white Dodge or Plymouth and met Mr. Gedesse at Ceasar's Palace, a bar on Dale Mabry Highway. (R304) When Mr. Gedesse left the bar at ten thirty or eleven, the Petitioner was still there with Michael Seary. (R305)

Michael Charles Seary, also a fellow employee at Maas Brothers (R307), arrived at the bar after work and stayed until about three in the morning of July 10, 1973. (R309) The Petitioner drove Mr. Seary to his Montgomery Avenue home in a white Dodge. (R310) The Petitioner, who had been drinking, left the Seary home at half past three or quarter till four. (R311) Mr. Seary described the Petitioner as wearing a shirt with Maas Brothers written on it, but without any stripes. (R313)

Patricia Ann Proffitt, the Petitioner's wife, (R321) was living at the DeSoto Trailer Park with her husband, Mary Bassett and Mary Bassett's daughter on July 9, 1973. (R322) The Petitioner went to work that day in a white Dodge, 1964 model, wearing his Maas Brothers uniform consisting of a white shirt and grey pants. (R323) The Petitioner returned to the trailer in the early morning of July 10, 1973. (R325) He had on the same clothes as when he left except that he was barefoot. (R326)

The trailer has a living room, a bathroom, a kitchen, two bedrooms, and a hallway. (R325) The appellant went into a bedroom, packed and left. (R326) Mrs. Proffitt then went to a telephone and called the police. (R328) She next saw the car in which her husband left the trailer at a place of business in Brooksville. *Id.*

On cross-examination, Mrs. Proffitt testified that the white, short-sleeve shirt worn by appellant when he left for work, and which he still wore on his return, has a blue oval emblem on it. (R331) Mrs. Bassett contributed one hundred dollars monthly to rent totaling two hundred dollars including utilities. (R330) The Petitioner made ninety to a hundred dollars weekly. *Id.* Mrs. Proffitt explained that her husband had abruptly left once before. (R331)

Vance Gatlin, a Tampa policeman, went to the Proffitt trailer at 5:45 A.M. on July 10, 1973, and seized a shirt and a pair of pants, which were marked as State's exhibits numbers ten and eleven, respectively. (R334)

M.O. Stamatakis, another Tampa policeman, spoke to Mesdames Bassett and Proffitt at the police station on July 10, 1973 and then went with them to the State Attorney's Office. (R340) Mr. Stamatakis sent the knife

and shirt to Washington and put them back in the property room when they were returned by mail. (R342, 343) State's exhibits nine, ten and eleven came into evidence without objection. (R346) A week before the trial, Mr. Stamatakis measured the distance between 115 South Lois and the DeSoto Trailer Park as 6.6 miles. *Id.* Over objection, he testified it had taken eleven minutes to make the drive.

Mr. R. J. Peters, a Florida Highway Patrolman, (R353) found a 1964 Dodge automobile abandoned on State Road 50 about 6:35 A.M. on July 10, 1973. (R353-355)

Paul Rene Bidez, an FBI serologist (R357), testified that the blood on the knife was human blood, type A, the same type decedent had. (R359-360) Droplets of blood on the shirt were human blood of an indeterminate type. (R361) Mr. Bidez testified that a stain had a crescent shape "as though something bloody had been wiped." (R361) Defense counsel's objection to this remark was sustained, but the prosecutor reiterated the testimony in the presence of the jury while arguing after the court had ruled. (R362)

On cross-examination, Mr. Bidez testified he was unable to determine how long the stains had been on the shirt. (R363) An examination of the knife for fingerprints yielded none. (R364)

Mary Helen Bassett and her daughter shared a trailer with the Proffitts. (R367) Over objection, Mrs. Bassett testified she awoke about half past five on July 10, 1973, and overheard a conversation between the Petitioner and his wife. (R375) The Petitioner told his wife he had stabbed a man while "burglarizing the place." (R376-377) Defense objected on hearsay grounds, was overruled and Mrs. Bassett testified to

questions Mrs. Proffitt asked the Petitioner. (R377) The Petitioner also said he struck a woman. (R379) Although Mrs. Bassett never saw the Petitioner, she was sure his was the voice she heard. (R388)

At the close of the evidence, the trial court instructed the jury that it could return verdicts of guilty of first degree murder, guilty of second degree murder, guilty of third degree murder, guilty of manslaughter, or not guilty. (R488-490) The jury found petitioner guilty of first degree murder. (R491)

A sentencing hearing was held following the verdict. The State offered into evidence a certified copy of a document from the State of Connecticut showing that petitioner had been convicted, on July 11, 1967, of breaking and entering without permission. Over objection, the document was admitted. (R495)

The State called James Crumbley, M.D., a diagnostic consultant to the Sheriff's Department, who had interviewed Petitioner in the Hillsborough County Jail on two occasions. On both occasions, the Petitioner came to Dr. Crumbley as a psychiatrist, seeking psychiatric treatment. (R503) Dr. Crumbley related the substance of his first discussion with the Petitioner:

> He told me that he was quite concerned because of the feeling which he had within himself which was so overwhelming until he felt that he would do damage to people in the future, as he had already done damage to an individual that he had killed. He further went on to state that he had this uncontrollable desire which built up to a terrific degree of unbearable tension for which he fought as hard as he could and, finally, one evening after work on the way home the uncontrollable desire came again that was of such intensity that he knew that he must kill someone and that he rode

around and found a place where a patio door was open and he went in and killed a man. That he stabbed him and that he was now facing trial. (R498)

The Petitioner also requested that the doctor "obtain for him some type of psychiatric help so that he would not kill someone again." (R499)

During the second interview, the Petitioner told Dr. Crumbley "that the tension and the feeling was one which could not be resisted and that once the deed had been done, that he felt a great degree of relaxation, as though a job which had to be done. . .had been completed." (R499) According to the doctor, Petitioner then felt the same "uncontrollable desire" building up again, and he wanted treatment for this "emotional pressure." Dr. Crumbley considered the Petitioner to be a dangerous man. (R500)

On cross-examination, Dr. Crumbley offered the following testimony:

Q. Doctor, when you examined, or discussed with the defendant the things that you have just related to the jury, were you acting as as psychiatrist?

A. Yes, I was.

Q. Did you feel that the defendant needed psychiatric help?

A. I did.

Q. Doctor, do you have an opinion as to whether or not the defendant committed the crime for which he has just been found guilty while under the influence of extreme emotional duress?

. . . . .

A. I am certain that this individual was under an intense amount of uncontrollable emotional stress.

Q. So that in fact what he did in the Medgebow home he couldn't help? In this a layman's way of stating what you just stated?

A. Yes.

Q. Doctor, do you have an opinion as to whether or not the defendant committed the crime for which he has been found guilty while under an extreme mental disturbance?

A. Yes, I think it could be called that.

Q. Now, Doctor, it is fair to say that the Defendant came to you as a psychiatrist, looking for help?

A. Yes.

Q. And that he in fact recognized, at least after the fact, that he needed psychiatric treatment and was coming to you for that purpose?

A. That is correct.

Q. Is a condition such as the defendant's a condition that can be treated?

A. Yes.

Q. If treated, would the defendant still be a danger to society or to fellow inmates?

A. He would not.

Q. Doctor, is it not true that there are confinement facilities which specialize or deal in the treatment of people with the emotional disturbance that the defendant apparently has?

A. That is correct.

Q. And that when one is confined in one of these facilities the individuals in charge of the facility hopefully know how to handle the situation?

A. That's correct.

Q. And they would work and attempt to cure the individual in question?

A. Correct.

Q. Doctor, do you have an opinion as to whether or not the defendant could conform his conduct to the requirements of law, at the time he committed the offense or whether his ability to do that was substantially impaired?

A. I'm certain that at the moment and at the time that this occurred this individual was overwhelmed with the force over which he had no control and to which he must carry out the deed.

Q. So that he was unable to conform his conduct to the requirements of law?

A. That is correct. (R502-505)

The State offered no further evidence in aggravation and petitioner offered no evidence in mitigation. (R505) The court then instructed the jury that:

"... the final decision as to what punishment should be imposed or shall be imposed, is the responsibility of the Judge. However, it is your duty to follow the law which will now be given you by the Court and render to the Court an advisory sentence, based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

. . . . . .

If you do not find that there existed any of the aggravating circumstances which have been described to you, it would be your duty to recommend a sentence to life imprisonment. If you should find one or more of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist.

. . . . . .

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed." (R529, 531, 533)

The jury's sentencing verdict stated "[t]he majority of the jury advise and recommend to the court that it impose the death penalty upon the defendant, Charles William Proffitt." (R535)

Before imposing sentence, the trial court ordered that Petitioner be examined by two psychiatrists. (R537) Both doctors concluded in their written reports that the Petitioner was mentally competent at the time of the offense and at the trial in that he was able to distinguish right from wrong.[5] (R44, 46)

While the trial court in the instant case had requested that the doctors determine petitioner's emotional disturbance at the time of the offense and whether his emotional and mental condition fit within any mitigating circumstances set forth in the capital punishment statute, (R542), the written evaluations failed to so determine. (R44, 46)

On March 21, 1975, the trial court concurred with the jury's finding that "the aggravating circumstances of this case far outweigh any mitigating circumstances

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[5]Since 1902 Florida has used the "M'Naghten", or "right from wrong." standard to measure the mental condition of a defendant and his responsibility for criminal acts. *Davis v. State*, 44 Fla. 312, 32 So. 822 (1902); See, e.g. *Piccott v. State*, 116 So.2d 626 (Fla. 1959); *Van Eaton v. State*, 205 So.2d 298 (Fla. 1967), cert. dismissed 400 U.S. 801. Florida has continued to adhere to M'Naghten for lack of a better alternative." *Anderson v. State* 276 So.2d 17 (Fla. 1973).

shown to exist" (R556), and sentenced Petitioner to die. (R557, 60-61)

The court based the sentence of death upon the following written findings of fact:

"AS TO AGGRAVATING CIRCUMSTANCES:

(A) That the Defendant, CHARLES WILLIAM PROFFITT, murdered JOEL RONNIE MEDGEBOW from a premeditated design and while the Defendant, CHARLES WILLIAM PROFFITT, was engaged in the commission of a felony, to-wit: burglary.

(B) That the Defendant, CHARLES WILLIAM PROFFITT, has the propensity to commit the crime for which he was convicted, to-wit: Murder in the First Degree and is a danger and a menace to society.

(C) That the murder of JOEL RONNIE MEDGEBOW by the Defendant, CHARLES WILLIAM PROFFITT, was especially heinous, atrocious and cruel.

(D) That the Defendant knowingly through his voluntary and intentional acts leading up to and during the course of the commission of the offense for which he was convicted created a great risk of serious bodily harm and death to many persons.

"AS TO MITIGATING CIRCUMSTANCES:

The Court finds that the enumerated mitigating circumstances set forth in F.S. 921.141 (7) are primarily negated, in that,

(A) The Defendant, CHARLES WILLIAM PROFFITT, was convicted in 1967 of Breaking and Entering without permission.

(B) That the capital felony for which the Defendant, CHARLES WILLIAM PROFFITT, was convicted was not committed while the Defendant, CHARLES WILLIAM PROFFITT, was under the

influence of extreme mental or emotional disturbance.

(C) That the victim, JOEL RONNIE MEDGEBOW, was *not* a participant in the Defendant's conduct nor did the victim, JOEL RONNIE MEDGEBOW, consent to the act.

(D) That the Defendant, CHARLES WILLIAM PROFFITT, was the only participant in the capital felony for which he has been convicted.

(E) That the Defendant, CHARLES WILLIAM PROFFITT, did *not* act under extreme duress during the commission of the offense nor was he, during that period of time under the substantial domination of another person.

(F) That at the time of the commission of the offense the Defendant's capacity to appreciate the criminality of his conduct or to conform this conduct to the requirements of law was *not* substantially impaired.

(G) The age of the Defendant, CHARLES WILLIAM PROFFITT, to-wit: age 28 years, has no particular significance and therefore is not a mitigating circumstance." (R57-58)

Petitioner's conviction and sentence of death was affirmed by the Supreme Court of Florida. *Proffitt v. State*, 315 So.2d 461 (Fla. 1975)

HOW THE CONSTITUTIONAL QUESTION WAS PRESENTED AND DECIDED BELOW

Petitioner moved in the trial court to dismiss the Indictment charging him with first degree murder on the grounds that the statutes under which the

Indictment was presented[6] violated the Constitution of the United States. (R21-25) Petitioner argued *inter alia* that the statutes provide for "[c]ruel and/or unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution" and "deprive the [Petitioner] of life, liberty or property without due process or equal protection of law, in violation of the Fifth and Fourteenth Amendments to the United States Constitution..." (R22) Petitioner further alleged "[t]hat the use of the death penalty, pursuant to Florida Statute 921.141 by the State of Florida, contravenes the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238, 33 L.3d.2d 346, 92 S.Ct. 2726 (1972)." and "[t]hat the use of the death penalty is cruel and/or unusual punishment in violation of the Eighth Amendment to the United States Constitution." (R23)

In his timely appeal to the Florida Supreme Court, Petitioner assigned as error the following:

> "The trial court's imposition of the death penalty constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.
>
> The trial court's imposition of the death penalty constituted the arbitrary infliction of punishment so as to deprive the defendant of life without due process of law, in contravention of the Fourteenth Amendment to the United States Consitution.
>
> The trial court erred in imposing death sentence in that the intentional extinguishing of life does not comport with human dignity.

[6]Fla.Stat.Ann. §§775.082, 782.04, and 921.141 (1973).

> The trial court erred in imposing death sentence in that execution is a wantonly freakish, arbitrary and capricious punishment, by its nature irrevocable.
>
> The trial court's imposition of the death penalty pursuant to *FLA.STAT.* §921.141 (1972) constituted cruel and unusual punishment and a denial of due process of law in contravention of the Eighth and Fourteenth Amendments to the United States Constitution in that the trial judge had untrammeled discretion to impose life sentence which could not be reviewed, but instead imposed sentence of death."
>
> (R614, 615)

The questions presented by these assignments of error were argued below, *Charles William Proffitt v. State of Florida*, Fla.Sup.Ct., No. 45, 541, Appellant's Brief at 46-48. The Florida Supreme Court rejected Petitioner's constitutional claim:

> "Finally, as to Appellant's eleventh point, whether the death penalty is cruel and unusual punishment, we note that this argument is meant to preserve the point for appeal, however, we are bound by our earlier pronouncement in State v. Dixon, 283 So.2d 1 (Fla. 1973)." *Proffitt v. State*, 315 So.2d at 467 (1975).

SUMMARY OF ARGUMENT

Florida's non-mandatory death penalty statute permits the same excessive discretionary sentencing system condemned by *Furman v. Georgia*. The statute requires the jury, for advisory purposes only, and the trial judge, for sentencing purposes, to consider such evidence as

the court deems relevant to certain enumerated statutory aggravating and mitigating circumstances. The weight to be given such evidence and the interpretation, determination and application of the statutory enumerated circumstances, depending upon the discretion of the sentencing judge, may result in a life or a death sentence.

While the statute requires automatic review of all death sentences by the Florida Supreme Court, no statutory guidelines define the nature, scope, or purpose of its review. By limiting the review to only capital cases where the trial judge imposed death, the statute defies uniformity of application. The affirmance or reversal of a death sentence requires the exercise of standardless discretion and further permits this unique penalty to be wantonly and freakishly applied.

Florida statutes do not purport to limit the discretion reposed in the State Attorney, the grand jury, or the trial jury, or the trial jury. Nor do they standardize the application of executive clemency to the death sentence. The Florida legislature has intentionally and carefully preserved discretionary opportunities for imposition or avoidance of the extreme penalty which are, in fact, as numerous and as unregulated as in the pre-*Furman* period.

The continued infliction of the death penalty under this arbitrary and selective sentencing system is cruel and unusual punishment in violation of the Eighth Amendment and a denial of the due process of law in contravention of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

I.

INTRODUCTION

In *Furman v. Georgia*, 408 U.S. 238 (1972), and its companion cases, this court ruled that "the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Id.* at 239-240. Contemporaneously with its decision in *Furman v. Georgia, supra*, and upon its authority, this Court in 1972 summarily vacated a number of Florida death sentences.[7] The Supreme Court of Florida,[8] the Court of Appeals for the Fifth Circuit,[9] and the District Court for the Middle District of Florida,[10] also vacated death sentences which had been imposed under Florida's "Recommendation of Mercy" statute as

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[7] *Anderson v. Florida*, 408 U.S. 938; *Pitts v. Wainwright*, 408 U.S. 491; *Boykin v. Florida*, 408 U.S. 940; *Brown v. Florida*, 408 U.S. 938; *Hawkins v. Wainwright*, 408 U.S. 941; *Johnson v. Florida*, 408 U.S. 939; *Paramore v. Florida*, 408 U.S. 935; *Thomas v. Florida*, 408 U.S. 935; *Williams v. Wainwright*, 408 U.S. 941.

[8] *Anderson v. State*, 267 So.2d 8 (Fla. 1972); *Chaney v. State*, 267 So.2d 65 (Fla. 1972); *Reed v. State*, 267 So.2d 70 (Fla. 1972); *In re Baker*, 267 So.2d 331 (Fla. 1972). *See also Donaldson v. Sack*, 265 So.2d 499 (Fla. 1972).

[9] *Newman v. Wainwright*, 464 F.2d 615 (5th Cir. 1972).

[10] *Adderly v. Wainwright*, 58 F.R.D. 389 (M.D. Fla. 1972).

invalid.[11] This procedure was found unconstitutional because it resulted in "the death penalty [being] inequitably, arbitrarily, and infrequently imposed."[12]

The Florida Legislature responded by enacting the Florida Capital Punishment Act, Laws of Florida c. 72-724, in a matter of days at a Special Session in December, 1972. This act, which authorizes the death penalty for first degree murder and for rape of a small child, was approved by the Governor on December 8, 1972, and took effect immediately.[13] The constitutionality of the 1972 Florida legislative reaction to *Furman* is now before the Court.

The New statute provides for a bifurcated trial in

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[11]Fla.Stat.Ann. §919.23 (1971).

"*Recommendation to Mercy*

(1) In all criminal trials, the jury, in addition to a verdict of guilty of any offense, may recommend the accused to the mercy of the court or to executive clemency, and such recommendation shall not qualify the verdict except in capital cases. In all cases the court shall award the sentence and shall fix the punishment of penalty prescribed by law.

(2) Whoever is convicted of a capital offense and recommended to the mercy of the court by a majority of the jury in their verdict, shall be sentenced to imprisonment for life; or if found by the judge of the court, where there is no jury, to be entitled to a recommendation to mercy, shall be sentenced to imprisonment for life, at the discretion of the court."

[12]*Newman v. Wainwright*, 464 F.2d at 619.

[13]Florida thus became the first state to enact a post-*Furman* death penalty statute. Note, *Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism*, 2 FLA.ST.L.REV. 108, 126 (1974).

capital cases.[14] A person found guilty or who pleads guilty to a capital offense receives a second trial before the same judge and the same jury to determine whether the sentence of death should be imposed.

At the second trial

> "(e)vidence may be presented as to any matter that the court deems relevant to sentencing, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) ((5)?) and (7) ((6)?) of this section.[15]
>
> Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements."[16]
>
> Fla. Stat. Ann. §921.141(1) (1975-1976 Supp.).

Florida Statutes Annotated § 921.141(5) (1975-1976

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[14]Florida Statutes Annotated §775.082 (1975-1976 Supp.) provides a possible death penalty for a "capital felony," to be administered pursuant to the sentencing procedure established by Fla.Stat.Ann. §921.141 (1975-1976 Supp.). Florida law defines two "capital felonies": first degree murder, Fla.Stat.Ann. §782.04(1) (1975-1976 Supp.), and sexual battery committed by a defendant eighteen years of age or older upon a child, eleven years of age or younger, Fla.Stat.Ann. §794.011(2)(1975-1976 Supp.).

[15]The subsections setting forth aggravating circumstances and mitigating circumstances in Fla.Stat.Ann. §921.141 (1975-1976 Supp.), however, are numbered, respectively, (5) and (6).

[16]This subsection prohibits, however, "the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Florida."

Supp.) specifies the following "aggravating circumstances":

"(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging or a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious or cruel,"

and §921.141(6) (1975-1956 Supp) lists the following "mitigating circumstances":

"(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant, at the time of the crime."

After hearing the sentencing evidence, the jury is to "render an advisory sentence to the Court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated . . . (in §921.141(5));

(b) Whether sufficient mitigating circumstances exist as enumerated in . . . (§921.141(6)), which outweigh the aggravating circumstances found to exist, and

(c) Based on these considerations, whether the Defendant should be sentenced to life or death."

Fla. Stat. Ann. §921.141(2) (1975-1976 Supp.). This sentencing recommendation is not required to be in writing, to reflect specific consideration of the statutory circumstances, to reveal the proportion of the jurors in favor of life and death, or to describe in any way the process whereby the jury arrived at its result. The "advisory sentence" does not bind the trial court, for "[n]otwithstanding the recommendation of the majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death." Fla. Stat. Ann.

§921.141(3) (1975-1976 Supp.). When the court imposes sentence, it must make "specific written findings of fact" in support of the sentence "based upon the circumstances in [Fla. Stat. Ann. §921.141(5), (6) (1975-1976 Supp.)] . . . and upon the record of the trial and the sentencing proceedings." Fla. Stat. Ann. §921.141(3)(b) (1975-1976 Supp.).

Each "judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida." Fla. Stat. Ann. §921.141(4) (1975-1976 Supp.). The statute provides no guidelines for this appellate scrutiny, and the scope of review is not clear. Executive discretion to grant or deny clemency in cases where a death sentence has been imposed remains unregulated by law.

In the case of *State v. Dixon*, 283 So.2d 1 (Fla. 1973) the Florida Supreme Court was asked to square the constitutionality of the new Florida Death penalty legislation with this Court's ruling in *Furman v. Georgia, supra.* A majority of the Florida Court concluded that the 1972 legislation was "constitutional as measured by the controlling law of this State and under the constitutional test provided by *Furman v. Georgia, supra.*" *Id.*, 283 So.2d at 11.[17] The two

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[17]After the Florida Supreme Court decided that it was "not in the province of this Court . . . to attempt to weigh the laws of the State of Florida in light of the separate opinions of the five justices who constituted the majority in *Furman v. Georgia* . . .", it began its analysis of the 1972 statute with the following premise:

> "The mere presence of discretion in the sentencing procedure cannot render the procedure violative of *Furman v. Georgia* . . ." *Id.*, 283 So.2d at 6. "Thus if the judicial discretion possible and necessary under *Fla. Stat.* §921.141,

(continued)

dissentors concluded that the new Florida legislation permitted arbitrary and discriminatory imposition of death sentences contrary to this Court's decision in *Furman.*[18]

The revised Florida death penalty legislation still results in the unpredictable, wanton and arbitrary imposition of death sentences due to the existence of various selective mechanisms which operate before, during, and after the sentencing of defendants charged with crimes potentially punishable by death. Despite the mandate of *Furman v. Georgia, supra,* the present Florida capital punishment statute provides "no meaningful basis for distinguishing the few cases in which . . . [the death penalty] is imposed from the many cases in which it is not." *Furman v. Georgia,*

(footnote continued from preceding page)

> F.S.A., can be shown to be reasonable and controlled, rather than capricious and discriminatory the test of *Furman v. Georgia, supra,* has been met." *Id.*, 283 So.2d at 7.

[18]Mr. Justice Ervin stated:

> ". . . I conclude that the cumulative effect of this statute is to allow essentially the same excessive discretionary system which the U.S. Supreme Court would not allow in the *Furman* line of cases." *Id.*, 283 So.2d at 14. (dissenting opinion).

Mr. Justice Boyd found that the 1972 law infused even greater discretion into the sentencing procedure than did the old "Recommendation of Mercy" statute:

> "Under the old system, a majority of the twelve member jury, in the exercise of their discretion, determined the nature of the punishment. Under the new law, to the exercise of that discretion is added the opportunity for the arbitrary, completely unfettered, and final exercise of discretion by the judge . . . Clearly, the new law provides for even more discretion than the quantum thereof condemned in *Furman.*" *Id.*, 283 So.2d at 26 (dissenting opinion).

supra, 408 U.S. at 313 (concurring opinion of Mr. Justice White).

II.

THE FLORIDA CAPITAL PUNISHMENT STATUTE PERPETUATES THE ARBITRARY AND SELECTIVE IMPOSITION OF THE DEATH PENALTY,

A. Sentencing Discretion in the Florida Procedure Results in the Arbitrary Infliction of the Death Penalty.

After Petitioner's jury found him guilty of first degree murder, a sentencing hearing was convened. The State offered into evidence a certified copy of a document fro the State of Connecticut showing that Petitioner had been convicted, on July 11, 1967, of breaking and entering without permission. Over objection, the document was admitted. (R495)[19]

[19]The relevance of this conviction is not clear. Florida Statutes Annotated §921.141(5)(b) recites as an "aggravating circumstance" that "(t)he defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence of the person." The State did not claim, however, that the Connecticut conviction qualified as such an aggravating circumstance. It was not even suggested that the 1967 crime involved the use or threat of violence to a person, much less "another capital felony."

The State then called James Crumbley, a physician with some psychiatric training (R501-502), who served as "a consultant to the Sheriff's Department for diagnostic problems" (R496-497) and who had interviewed Petitioner on two occasions.

Both interviews were at Petitioner's request and both dealt with the charges then pending against him. Both interviews lasted approximately fifteen or twenty minutes. The doctor performed no psychiatric or psychological testing of Petitioner (R501). Dr. Crumbley testified:

> He told me that he was quite concerned because of the feeling which he had within himself which was so overwhelming until he felt that he would do damage to people in the future, as he had already done damage to an individual that he had killed. He further went on to state that he had this uncontrollable desire which built up to a terrific degree of unbearable tension for which he fought as hard as he could and, finally, one evening after work on the way home the uncontrollable desire came again and that was of such intensity that he knew that he must kill someone and that he rode around and found a place where a patio door was open and he went in and killed a man. That he stabbed him and that he was now facing trial.

Petitioner asked Dr. Crumbley to "[o]btain for him some type of psychiatric help." (R499)

The doctor considered Petitioner a danger to society and a potential "danger to other inmates of any prison or any facility for incarceration." (R500)

On cross-examination, defense counsel sought to establish the existence of three mitigating circum-

stances.[20]

Q. Doctor, do you have an opinion as to whether or not the defendant committed the crime for which he has just been found guilty while under the influence of extreme emotional duress?

A. I am certain that this individual was under an intense amount of uncontrollable emotional stress.

Q. So that in fact what he did in the Medgebow home he couldn't help; Is that a layman's way of stating what you just stated?

A. Yes.

Q. Doctor, do you have an opinion as to whether or not the defendant committed the crime for which he has been found guilty while under an extreme mental disturbance?

A. Yes, I think it could be called that.

Q. Now, Doctor, is it fair to say that the defendant came to you as a psychiatrist, looking for help?

A. Yes.

Q. And that he in fact recognized, at least after the fact, that he needed psychiatric treatment and was coming to you for that purpose?

A. That is correct.

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[20]During cross-examination, the defense sought to establish the existence of the following "mitigating circumstances": "(t)he capital felony was committed while the defendant was under the influence of extreme mental or emotional stress" (Fla.Stat.Ann. §941.121(6)(b)); "[t]he defendant acted under extreme duress or under the substantial domination of another person" (Fla.Stat.Ann. §941.121(6)(e)); and "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired". (Fla.Stat.Ann. §941.121(6)(f).)

Q. Is a condition such as the defendant's a condition that can be treated?

A. Yes.

Q. If treated, would the defendant still be a danger to society or to fellow inmates?

A. He would not. (R502-504)

The State offered no further evidence in aggravation and Petitioner offered no evidence. (R505) After argument of counsel and instructions by the Court[21], the jury returned an advisory sentencing verdict which

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[21]The Court instructed the jury that:

"... the final decision as to what punishment should be imposed or shall be imposed, is the responsibility of the Judge. However, it is your duty to follow the law which will now be given you by the Court and render to the Court an advisory sentence, based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

. . . . . .

If you do not find that there existed any of the aggravating circumstances which have been described to you, it would be your duty to recommend a sentence to life imprisonment. If you should find one or more of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist.

. . . . . .

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed." (R452, 454, 456)

stated simply: "A majority of the jury advise and recommend to the Court that it impose the death penalty upon the defendant, Charles William Proffitt." (R535)

There is nothing to indicate from the form of this verdict which specific aggravating circumstances were found to "sufficiently" support the recommendation.

Before pronouncing sentence, the trial court appointed two psychiatrists. At a second sentencing hearing (at which no jury was present) one psychiatrist testified and the written report of the other was introduced. At the conclusion of the hearing, the trial judge sentenced Petitioner to death (R557), and subsequently entered a written order finding the existence of four "aggravating circumstances":

> "(A) That the Defendant, CHARLES WILLIAM PROFFITT, murdered JOEL RONNIE MEDGEBOW from a premeditated design and while the Defendant, CHARLES WILLIAM PROFFITT, was engaged in the commission of a felony, to-wit: burglary.
>
> (B) That the Defendant, CHARLES WILLIAM PROFFITT, has the propensity to commit the crime for which he was convicted, to-wit: Murder in the First Degree and is a danger and a menace to society.
>
> (C) That the murder of JOEL RONNIE MEDGEBOW, by the Defendant, CHARLES WILLIAM PROFFITT, was especially heinous, atrocious and cruel.
>
> (D) That the Defendant knowingly though his voluntary and intentional acts leading up to and during the course of the commission of the offense for which he was convicted created a great risk of serious bodily harm and death to many persons."

(R206-27). The court also found that the statutory "mitigating circumstances" were "primarily negated" because:

> (A) The defendant, CHARLES WILLIAM PROFFITT, was convicted in 1967 of Breaking and Entering Without Permission.
>
> (B) That the capital felony for which the Defendant, CHARLES WILLIAM PROFFITT, was convicted was not committed while the Defendant, CHARLES WILLIAM PROFFIT was under extreme mental or emotional disturbance.
>
> (C) That the victim, JOEL RONNIE MEDGEBOW, was *not* a participant in the Defendant's conduct nor did the victim, JOEL RONNIE MEDGEBOW, consent to the act.
>
> (D) That the Defendant, CHARLES WILLIAM PROFFITT, was the only participant in the capital felony for which he has been convicted.
>
> (E) That the Defendant, CHARLES WILLIAM PROFFITT, did *not* act under extreme duress during the commission of the offense nor was he, during that period time under the substantial domination of another person.
>
> (F) That at the time of the commission of the offense the Defendant's capacity to appreciate the criminality of his conduct or to conform this conduct to the requirements of law was *not* substantially impaired.
>
> (G) The age of the Defendant, CHARLES WILLIAM PROFFITT, to-wit: age 28 years, has no particular significance and therefore is not a mitigating circumstance. (R207) (emphasis was original).

In conclusion, "The Court (found) that the Defendant, CHARLES WILLIAM PROFFITT, has been and

would continue to be a danger and a menace to society and therefore must pay the ultimate penalty, death by electrocution." (R208)

1. The evidence which may be considered for sentencing purposes as well as the weight to be given to such evidence is left to discretion of the sentencing judge.

The statute requires the trial judge and jury to base their decisions upon whether "sufficient" aggravating circumstances exist and whether "sufficient mitigating circumstances exist which outweigh aggravating circumstances found to exist.[22] Not only is the evidence which may be presented left to the court's determination of relevance and probative value,[23] but the statute fails to define the term "sufficient".

The determination of what constitutes "sufficient" aggravating circumstances or "sufficient" mitigating circumstances and which set of circumstances outweighs the other is left to the sole discretion of the jury and trial judge. Both the trial judge and the jury are left with the discretion to determine what weight is to be given to each individual aggravating and mitigating circumstance. The presence or absence of any such circumstances or combination thereof does not compel any particular result. Whether a particular aggravating circumstance or circumstances will outweigh a particular mitigating circumstance or circumstances is solely within the discretion of the trial judge and jury. While the Supreme Court of Florida has held that aggravating circumstances must be established by proof beyond a

[22]*See* Fla.Stat.Ann. §921.141(2) (1975-1976 Supp.).

[23]Fla.Stat.Ann. §921.141(1) (1975-1976 Supp.).

reasonable doubt,[24] no such guidance appears in the statute nor has any standard been suggested for the proof necessary to establish mitigating circumstances.

The consideration of matters by the trial court not presented to the trial jury has been expressly approved.[25] The value of the jury's advisory verdict in this sentencing system is unclear but it is apparent that the trial judge has complete discretion to consider whatever evidence he determines relevant and to give such weight to the evidence as he deems appropriate.

[24]*State v. Dixon, supra*, 283 So.2d at 9.

[25]In *Sawyer v. State*, 313 So.2d 680 (Fla. 1975) the trial court overruled a jury recommendation of life on the basis of six "additional facts which the jury did not have during their deliberation on the advisory sentence." *Id.* at 681. The Florida Supreme Court affirmed. In *Douglas v. State*, Fla.Sup.Ct. No. 44,864 (Feb. 18, 1976), *Thompson v. State*, Fla.Sup.Ct. No. 45,107 Jan. 21, 1976), *Gardner v. State*, 313 So.2d 675 (Fla. 1975) the Florida Supreme Court approved the use or non-use of presentence investigation reports. Apparently, in Florida, the sentencing judge may obtain the report if he so desires, but it is not mandatory. In an opinion dissenting to the court's affirmance of Gardner's death sentence Justice Ervin declared:

> It is . . . logically inconsistent to allow the trial judge to consider such extraneous matters . . . which are clearly not aggravating or mitigating circumstances expressly enumerated in the statute, in effect re-introducing the element of discretion in the trial judge which was abhorrent to a majority of the United States Supreme Court in *Furman* and which a majority of this Court saw barred by the operation of Section 921.141 in *Dixon*.

Id., 313 So.2d at 678.

2. The interpretation, determination, and application of the statutory mitigating and aggravating circumstances is within the discretion of the sentencing judge.

The statutory aggravating and mitigating circumstances are vague, indefinite, and are susceptible to reasonably different subjective interpretation and understanding on the part of jurors and trial judges. Determinations that "the capital felony was especially *heinous*, atrocious or cruel"; "that the Defendant has no *significant* history of criminal activity"; "the Defendant knowingly created a *great* risk to *many* others"; that "the Defendant acted under *extreme* duress or under *substantial* domination of another person"; or that "the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was substantially impaired"; clearly requires discretion in interpretation and in application. It is unrealistic to suggest that reasonable men would not or could not differ in their definition of "heinous," "sufficient," "great," "many." "extreme," or "substantial."

The trial court found at paragraph "C" of the aggravating circumstances that the murder was "especially heinous, atrocious and cruel." But the victim's *death was the result of a single stab wound*. (R226, 229)

The term "heinous" may be acceptably descriptive and applied by laymen or sentencing judges to any crime. When considering this particular aggravating circumstance the Supreme Court of Florida observed:

> "We feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoy of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such *additional acts* as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State v. Dixon, supra*, 283 So.2d at 9. (emphasis added).

In the Petitioner's case, not a single additional act "set[s] the crime apart from the norm of capital felonies." In *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975) (footnote omitted), the Court observed, "[i]t is apparent that all killings are atrocious. . . . Still, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." *Cf., Halliwell v. State*, 323 So.2d 557 (Fla. 1975); *Douglas v. State*, Fla. Sup.Ct. No. 44,864, (Feb. 18, 1976).

It would be difficult, if not impossible, for one to logically suggest that the conduct of the Petitioner warrants the imposition of the death sentence when compared to the conduct described in the case of *State of Florida vs Michael Lawrence Powers*[26] Defendant Powers was indicted for first degree murder and robbery. Upon conviction the jury recommended and the trial court imposed a life sentence. Powers entered a small convenience store, forced the proprietor to sit on a box at the rear of the store at which time Powers

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[26]*See* Appendix A at A-27.

fired three shots into the victim's head killing him instantly. It appeared that Powers made statements to his brother that once he got in the store he was going to kill the proprietor. While in jail during the pendency of the trial he made numerous statements that he had intended to and was glad he shot the proprietor.

In the Petitioner's case, the trial court found as an aggravating circumstance that the Petitioner's acts "created a great risk of serious bodily harm and death to many persons."[27] This finding reflects a profound misunderstanding of the evils at which this particular provision was aimed. This part of the 1972 Florida Statute is directed at wanton and serious endangering of the general public, as by exploding a bomb in a public place, shooting into a crowd, or hijacking an airplane. Indeed, in a hearing before the Select Committee on the Death Penalty of the Florida House of Representatives, Committee Chairman Jeff D. Gautier summarized this provision: 'The defendant knowingly created risk of death to many persons. That's your hijacking sections (sic)."[28] This "aggravating circumstance" was patently inapplicable to this case, since during the course of the crime petitioner came into contact with only one other person besides the victim. There was no evidence to indicate that the Petitioner used or attempted to use the knife on any other person.

The arbitrary application of "great risk to many persons" as well as "especially heinous, atrocious or cruel" is illustrated when Petitioner"s conduct is

[27]Fla.Stat.Ann. 921.141(5)(c) (1975-1976 Supp.) does not list a great risk of "serious bodily harm" to many persons as an aggravating circumstance.

[28]Hearings, Select Committee on the Death Penalty, Florida House of Representatives, at 66 (Aug. 4, 1972).

compared with that of John Lee Gentry[29] . Gentry had a domestic quarrel with his common law wife. The victim ran into an adjoining room where her mother was seated and jumped into her mother's lap seeking protection. The defendant ran into the room brandishing a large butcher knife. Another occupant of the room stood up and asked the defendant what he was doing whereupon the defendant cut the occupant with the butcher knife, declaring that "I am going to kill all three of you". He then stabbed the victim twice in the chest as she sat cuddled in her mother's arms. Gentry was convicted of first degree murder, and the trial jury recommended and the trial judge imposed a life sentence. In one of the few cases where the trial judge explained the imposition of the life sentence he stated:

> "[I]t is indeed difficult to take the position that first degree murder from a premeditated design is not especially heinous, atrocious or cruel when the defendant, after a domestic dispute takes a butcher knife and chases the woman with whom he has lived into another apartment and plunges the knife into her chest while he threatened to kill the victim. Then he calmly walks from the apartment as if nothing had occurred."

In *State v. Dixon, supra,* The Florida Supreme Court recognized the danger of overly broad interpretations of "great" and "many", but expressed the hope that the trial judges would avail themselves of "ordinary intelligence and knowledge":

> Likewise, *Fla. Stat.* §921.141(6)(c), F.S.A. provides the death penalty for one who is convicted

[29]Appendix A at A-16.

> of a capital felony in which he knowingly created a great risk of death to many persons. The use of the adjectives "great" and "many" is attacked as vague, but we feel that a man of ordinary intelligence and knowledge easily conceives the concepts involved. *Id.* 283 So.2d at 9.

It is clear that the trial court in the Petitioner's case gave little or no weight to the evidence of support of the mitigating circumstances. Surely the single seven year old conviction for breaking and entering without permission could properly support the conclusion that "the defendant had no significant history of prior criminal activity". Yet the Court interpreted, determined, and applied the word "significant" to mean a single conviction.

The testimony of Dr. Crumbley, the State's witness, indicates that the Petitioner was "under an intense amount of emotional stress and was able to conform his conduct to the requirement of law". (R504-505) The trial judge clearly disregarded this testimony but we submit that the testimony could properly support a finding of the existence of the mitigating circumstance that the crime was committed while the defendant was under the influence of "extreme mental or emotional disturbance"[30] , or that "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired"[31] . Another sentencer may have accepted this evidence and found the existence of such mitigating circumstances and that such mitigating

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[30]Fla.Stat.Ann. §921.141(6)(e) (1975-1976 Supp.)

[31]Fla.Stat.Ann. §921.141(6)(f) (1975-1976 Supp.)

circumstances outweighed one or all of the aggravating circumstances. It is apparent therefore that since judicial discretion is essential in interpreting, determining, and applying the enumerated statutory "circumstances", uniformity of the imposition of the death penalty is precluded.

3. The circumstances which may be considered in support of the death penalty are left to the discretion of the sentencing judge.

While the Florida Supreme Court has asserted that the most important safeguard provided by *Fla. Stat.* §921.141 is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed,[32] the trial court in its findings of fact in support of the death penalty included in paragraph "A" of the aggravating circumstances, the murder was premeditated. But premeditation is not listed as an aggravating circumstance.[33] The

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[32]*Alford v. State*, 307 So.2d 433, 444 (Fla. 1975); *State v. Dixon, supra*, 283 So.2d at 8.

[33]Perhaps "premeditation" is not listed as an aggravating circumstance in the statute because all capital murders, with the exception of capital felony murders, necessarily are premediated murders. Yet Fla.Stat.Ann. §921.141(5)(d) (1975-1976 Supp.) provides in essense, that all felony murders are aggravated murders.

State v. Dixon, established a presumption: "When one or more aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more mitigating circumstances . . ." *Id.* , 283 So.2d at 9.

If the trial judge in the Petitioners case is correct in finding this murder aggravated for the reason it was premeditated then *all* capital murders are, *a priori*, aggravated murder unless there are counter balancing mitigating circumstances.

jury found Petitioner guilty, as charged, of premeditated murder. Their verdict did not reflect a specific finding that the murder was committed while Petitioner was engaged in the perpetration of the felony of burglary. Yet, the trial court found that the Petitioner committed this premeditated murder while "engaged in the commission of a burglary." This speculative conclusion was listed as an aggravating circumstance. Assuming, arguendo, that the judge's discretionary determination is supported by the record it is clear why this particular felony murder is any more aggravated than the many of which life sentences have been imposed[34] or in which the Florida Supreme Court has vacated the death penalty.[35]

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[34]*See, e.g., Hernandez v. State,* 323 So.2d 318 (Fla.App. 1975); *Wilson v. State,* 306 So.2d 513 (Fla. 1975); *Miller v. State,* 300 So.2d 53 (Fla.App. 1974); *Jefferson v. State,* 298 So.2d 465 (Fla.App. 1974); *Williams v. State,* 297 So.2d 67 (Fla.App. 1974); *Dinkens v. State,* 291 So.2d 122 (Fla.App. 1974); capital defendants have also been convicted of second degree murder in felony murder situations, *see, e.g., Ballard v. State,* 323 So.2d 297 (Fla.App. 1975); *Gilbert v. State,* 311 So.2d 385 (Fla. App. 1975).

[35]*See Taylor v. State,* 294 So.2d 648 (Fla. 1974); *Swan v. State,* 322 So.2d 485 (Fla. 1975); *Slater v. State,* 316 So.2d 539 (Fla. 1975); *Thompson v. State,* Fla.Sup.Ct.No. 45,107 (Jan. 21, 1976). In *Swan,* for example, the defendant and a companion burglarized a home at night and gave the forty-nine year old house keeper such a "severe beating," 322 So.2d at 486, that she died from "the torture . . . [defendant Swan] administered," 322 So.2d at 487. The Florida Supreme Court nevertheless held that considering "the total record, we are of the opinion that there were insufficient aggravating circumstances to justify the imposition of the death penalty." 322 So.2d at 489. The

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In paragraph "B" of the aggravating circumstances the trial court finds, beyond a reasonable doubt, that Petitioner "has the propensity to commit the crime for which he was arrested . . . [making him] a menace to society." None of the criteria, specified as exclusive by *Fla. Stat.* §921.141, embrace any concept of "propensity".

Moreover, the determination that petitioner had a "propensity" to commit murder and that he was a "menace to society" is not supportable as a "finding of fact" since there is no basis in the record for it and since it is not clear that it is *possible* to make such a determination. There is extraordinary disagreement among medical experts and social scientists about whether and the extent it is possible to predict future anti-social behavior on the part of a particular individual.[36]

The Florida Supreme Court has squarely held that the aggravating circumstances which justify a death

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burglary-murder here (in which the deceased was stabbed once) seems clearly less aggravating than that which occurred in *Swan.*

In *Thompson* the Defendant entered a restaurant for the purpose of robbing the proprietor. During the course of the robbery the defendant and the proprietor struggled over a knife. The proprietor broke away from the defendant and ran from the restaurant. The defendant chased the proprietor, caught him and stabbed him several times from which wounds he died. The defendant then entered the restaurant, grabbed the bills from the cash register and ran away. The trial court's sentence of death was reversed.

[36]*See generally* Rosen, *Detection of Suicidal Patients An Example of Some Limitations in the Prediction of Infrequent Events,* 18, J. CONSULTING PSYCH. 398, 398 n.4 (1954);

sentence need not be those specified in §921.141 and that a death sentence may be affirmed on the basis solely of non-statutory "aggravating circumstances". In *Sawyer v. State*, 313 So.2d 680 (Fla. 1975), the trial court overruled a jury recommendation of a life sentence for a first degree murder and imposed a death sentence partially on the basis of information which had not been presented to the jury. The trial judge's opinion listed six "additional facts which the jury did not have during their deliberation on the advisory sentence." 313 So.2d at 681, to justify imposition of the death sentence. The Florida Supreme Court recast these findings in terms of "aggravating circumstances" (although not "aggravating circumstances" iterated in §921.141) and affirmed appellant Sawyer's death sentence.

In response to Petitioner's suggestion that *Fla. Stat* §921.141 was incorrectly applied in his case, the Florida Supreme Court observed, without further comment, that "[o]bviously . . . no error was committed." *Proffitt v. State*, *supra* at 467. It is clear from the case, however, that the statute does not lend itself to uniform interpretation and application even to men of "ordinary intelligence and knowledge." *State v. Dixon*, *supra*, 283 So.2d at 9. Indeed, the number of possible aggravating circumstances for which a capital defendant may be condemned is bounded only by the ingenuity of trial judges, and the listing of "aggravating circumstances" in §921.141. does "no more than suggest some subject of the jury [and trial judge] to consider during . . . [their] deliberation." *McGautha v.*

California, 402 U.S. 183 at 207 (1971).[37]

Broad discretionary power is reposed in the trial judge to impose the sentence of death under this statute. To illustrate we direct the Court's attention to *State v. Peoples*[38] The judge who sentenced the Petitioner to die was the same trial judge who presided in the *Peoples* case. From the evidence it appears that Peoples armed himself with a rifle and stationed himself at a second story window across the street from his girl friend's home where she was sitting with the victim, a young man. From his vantage point, Peoples shot the victim in the head with a rifle. The jury returned a verdict of guilty, and upon consideration of the evidence, recommended the imposition of the death sentence. In spite of the jury's finding, the State Attorney stipulated that there were no aggravating circumstances. The Court made no express findings of fact and sentenced Peoples to life imprisonment. It is difficult for a reasonable man to reconcile the imposition of a death sentence for Petitioner's conduct, *under this statute*, and the life sentence imposed on defendant Peoples. Both juries recommended death. The judge, in the exercise of his discretion, sentenced Peoples to life and Proffitt to death.

The number of factors in aggravation and mitigation which the jury and trial judge may consider in deciding whether to take the defendant's life is unlimited. With no practicable limitations on the factors or circum-

[37]It is instructive that the above quoted language from *McGautha v. California*, *supra*, was written about the American Law Institute Model Penal Code, §210.6 (Official 1962) after which Fla.Stat.Ann., Sec. 921. 141 (1972) was clearly patterned.

[38]*See* Appendix A at A-65.

stances which may be considered by the sentencer in determining whether to impose the death sentence, uniformity in the imposition and application of this most extreme penalty cannot exist.

4. The death penalty may be applied in any capital crime depending upon the discretion of the sentencing judge.

This Court has long recognized the difficulty of laying down exact rules for the infliction of the death penalty.[39] In *McGautha v. California, supra,* 402 U.S. at 197, the Court observed that: "history reveals continual efforts, uniformly unsuccessful, to identify before the fact those homicides for which the slayer should die." The factors which are relevant to sentencing are simply too multifarious and elusive for precise and exhaustive definition.[40] Simultaneous with

[39] *Winston v. United States*, 172 U.S. 303, 312-13 (1899).

[40] Justice Harlan observed in *McGautha:*

> It is apparent that such criteria [sentencing standards] do not purport to provide more than the most minimal control of the sentencing authority's exercise of discretion. They do not purport to give an exhaustive list of the relevant considerations or the way in which they may be affected by the presence or absence of other circumstances. They do not even undertake to exclude constitutionally impermissible considerations. And, of course, they provide no protection against the jury determined to decide on whimsy or caprice. 401 U.S. at 207 (footnote omitted).

The same conclusion was reached in ROYAL COMMISSION ON CAPITAL PUNISHMENT, ¶595: "No formula is possible that would provide a reasonable criterion for the infinite variety

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Furman v. Georgia, and upon its authority the Court reaffirmed its conclusion by holding death sentences unconstitutional despite the fact that they were imposed under systems that provided for bifurcated trials in capital cases,[41] and provided standards for the

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of circumstances that may affect the gravity of the crime of murder. Discretionary judgement on the facts of each case is the only way in which they can be equitably distinguished. This conclusion is born out by American experience: there the experiment of degrees of murder, introduced long ago, had to be supplemented by giving to the courts a discretion that in effect supersedes it."

Chief Justice Burger in his dissent to *Furman* agreed that suitable sentencing standards could not be devised. 408 U.S. at 401. Moreover, he added:

> "But even assuming that suitable guidelines can be established, there is no assurance that sentencing patterns will change so long as juries are possessed of the power to determine the sentence or to bring in a verdict of guilt on a charge carrying a lesser sentence; juries have not been inhibited in the exercise of these powers in the past. *Id.*"

[41] At the time of *Furman*, six states provided for bifurcated trials in capital cases: CAL.PENAL CODE, §190.1 (Deering 1966); CONN.GEN.STAT.ANN. §53-10 (1960); GA. CODE ANN. §27-2534 (1972); N.Y. PENAL LAW §§125.30, .35 (McKinney 1967); PA.STAT.ANN. tit. 18, §4701 (1963); TEXAS CODE CRIM.PROC.ANN. art 37.07 (1966). Four of these states had capital cases before the United States Supreme Court, and the death sentence in each case was reversed. *Davis v. Connecticut,* 408 U.S. 935 (1972); *Jackson v. Georgia,* 408 U.S. 238 (1972); *Scoleri v. Pennsylvania,* 408 U.S. 934 (1972); *Phelan v. Brierley,* 408 U.S. 939 (1972); *Matthews v. Texas,* 408 U.S. 940 (1972); *Curry v. Texas,* 408 U.S. 939 (1972); *McKenzie v. Texas,* 408 U.S. 938 (1972). New York had no case before the Court and California had, shortly before *Furman* ruled the state's death

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exercise of sentencing discretion.[42] The Court drew no

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penalty unconstitutional. *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal.Rptr. 152 (1972); *see Aikens v. California*, 406 U.S. 813 (1972).

[42]In Connecticut, for example, pre-*Furman* law provided for a separate penalty trial in capital cases, at which "[e]vidence may be presented . . . on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty." CONN.GEN.STAT.ANN. §53-10 (1960), as amended, §53a-46 (1972). The determination of penalty had to be made "on the evidence presented." CONN.GEN.STAT.ANN. §53-10 (1960), as amended §53a-10 (1972). Despite these sentencing standards, this Court vacated death sentences in Connecticut capital cases after *Furman*. *E.g., Davis v. Connecticut*, 408 U.S. 935 (1972); *Delgado v. Connecticut*, 408 U.S. 940 (1972).

In Illinois, pre-*Furman* law provided that a defendant "was entitled to have his punishment determined upon evidence limited to the facts and circumstances of that crime." *People v. Black*, 10 N.E.2d 801, 804 (Ill. 1937). Furthermore, "[it] was also the duty of the jury to fix the penalty from a consideration of all the circumstances, including the heinousness, atrocity, and cruelty of the crime. . . ." *People v. Sullivan*, 177 N.E. 733, 736 (Ill. 1931). See also *People v. Winchester*, 185 N.E. 580 (Ill. 1933); *People v. Cassler*, 163 N.E. 430 (Ill. 1928). A trial judge could reduce a jury-imposed death sentence, ILL.REV.STAT. ch. 38, §1-7-(c)(1)(1972); see note infra, and the state appellate courts could also modify a sentence of death to life imprisonment. Nevertheless, this Court vacated death sentences in Illinois capital cases after *Furman*. *E.g., Hurst v. Illinois*, 408 U.S. 935 (1972); *Moore v. Illinois*, 408 U.S. 786 (1972).

In Nebraska, pre-*Furman* law provided that, in its decision of the death penalty, a jury "had no right to be actuated by considerations of mercy but should be guided alone by the evidence, the facts, and the circumstances disclosed by the

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distinction between those two cases where the sentencing discretion was vested and exercised dolely by the

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record. . . ." *Sundahl v. State*, 48 N.W.2d 689, 701 (Neb. 1951); see *Dinsmore v. State*, 85 N.W. 445 (Neb. 1901). Nebraska also provided for appellate review of death sentences. See *Sundahl v. State*, 48 N.W.2d 689 (Neb. 1951). Regardless of these protections this Court vacated death sentences in Nebraska capital cases. *E.g., Pope v. Nebraska*, 408 U.S. 933 (1972); *Alvarez v. Nebraska*, 408 U.S. 937 (1972).

In New Jersey pre-*Furman* law provided that a recommendation of imprisonment had to be "upon and after the consideration of all the evidence." N.J. STAT. ANN. §2A:113-4 (1969). " 'including the evidence relative to the background and mental and emotional abilities and disabilities of . . . defendant's.' " *State v. Reynolds*, 195 A.2d 449, 461 (N.J. 1963). See also *State v. Mount*, 152 A.2d 343 (N.J. 1959). Capital sentences imposed under New Jersey law were vacated by this Court. *E.g., Billingsley v. New Jersey*, 408 U.S. 934 (1972); *In re Reynolds*, 408 U.S. 934 (1972).

In Ohio, pre-*Furman* law provided that the jury's right to recommend mercy was bound by "the facts and circumstances described by the evidence." *State v. Tudor*, 95 N.E.2d 385, 390 (Ohio 1950). It was further provided that the jury " 'must not be motivated by sympathy or prejudice. . . .' " *State v. Eaton*, 249 N.E.2d 897, 907 n.4 (Ohio 1969). See also *Howell v. State*, 131 N.E. 706 (Ohio 1921). Nevertheless, capital sentences imposed under Ohio law were vacated. *E.g., Carter v. Ohio*, 408 U.S. 936 (1972); *Duling v. Ohio*, 408 U.S. 936 (1972); *Bryson v. Ohio*, 408 U.S. 938 (1972).

In Tennessee, pre-*Furman* law provided that the penalty for murder was death, but that "the jury may, if they are of the opinion that there are mitigating circumstances, fix the punishment at [from twenty years to life imprisonment]." TENN. CODE ANN. §39-2406 (19-5). The jury was instructed in these terms and was to make a finding of mitigating

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trial judge[43] and those cases where the trial judge had authority to overturn a jury recommendation as to sentence.[44]

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circumstances "by a consideration of the evidence and upon a finding of facts creating such opinion." *Woodruff v. State*, 51 S.W.2d 843, 847 (Tenn. 1932). This Court vacated Tennessee capital cases in the wake of *Furman. E.g., Herron v. State*, 456 S.W. 873, 879 (Tenn. 1970), vacated mem., 408 U.S. 937 (1972), wherein the Tennessee Supreme Court had upheld the death sentence on the grounds that "the evidence wholly fails to show mitigating circumstances." See also *State v. Dixon*, 283 So.2d 1, 15-16 (Fla. 1973) (Ervin, J., dissenting).

[43]*Alford v. Eyman*, 408 U.S. 939 (1972); *Janovic v. Eyman*, 408 U.S. 934 (1972); *Kruchten v. Eyman*, 408 U.S. 934 (1972); *Alvarez v. Nebraska*, 408 U.S. 937 (1972); *Menthen v. Oklahoma*, 408 U.S. 940 (1972); *Phelan v. Brierley*, 408 U.S. 939 (1972); *Fesmire v. Oklahoma*, 408 U.S. 935 (1972); *Morford v. Hocker*, 408 U.S. 934 (1972); *Delgado v. Connecticut*, 408 U.S. 940 (1972); *Cunningham v. Warden*, 408 U.S. (1972); *Gilmore v. Maryland*, 408 U.S. 940 (1972); *Johnson v. Maryland*, 408 U.S. 937 (1972); *Mefford v. Warden*, 408 U.S. 935 (1972); *Miller v. Maryland*, 408 U.S. 934 (1972); *Pope v. Nebraska*, 408 U.S. 933 (1972); *Staten v. Ohio*, 408 U.S. 938 (1972); *White v. Ohio*, 408 U.S. 939 (1972); *Brickhouse v. Slayton*, 408 938 (1972); *Fogg v. Slayton*, 408 U.S. 937 (1972).

[44]In several cases overturned, the jury could make a binding recommendation of death, but a recommendation of mercy could be overridden by a judge. *Seency v. Delaware*, 408 U.S. 939 (1972); *Steigler v. Delaware*, 408 U.S. 939 (1972); *Kelbach and Lance v. Utah*, 408 U.S. 935 (1972). In several others cases overturned, the jury could make a binding recommendation of mercy, but a recommendation of death could be overridden by a judge. *Hurst v. Illinois*, 408 U.S. 935 (1972); *Moore v. Illinois*, 408 U.S. 786 (1972); *Arrington v. Maryland*, 408 U.S. 938 (1972); *Bartholomey v. Maryland*, 408 U.S. 937 (1972); *Strong v. Maryland*, 408 U.S. 939 (1972); *Tull v. Warden*, 408 U.S. 939 (1972).

The Florida Capital Punishment Act incorporates many, if not all, of these defects. Nevertheless, the Supreme Court of Florida determined that the statute does not violate the Eighth or Fourteenth Amendments of the United States Constitution because:

> "The mere presence of discretion in the sentencing procedure cannot render the procedure violative of *Furman v. Georgia, supra*; it was, rather, the quality of discretion and the manner in which it was applied that dictated the role of law which constitutes *Furman v. Georgia, supra.*
>
> . . . .
>
> Thus, if the judicial discretion possible and necessary under Fla. Stat. §921.141, F.S.A. can be shown to be reasonable and controlled rather than capricious and discrimatory, the test of *Furman v. Georgia, supra,* has been met. . . . *State v. Dixon, supra,* 283, So.2d at 6, 7.

Experience has shown that the test has not been met . . . "Sentencing under the Fla. Stat. Ann. 921.141 has not been "reasonable and controllable" but instead has been unpredictable.[45]

[45]At a 1972 legislative hearing before the Select Committee on the Death Penalty of the Florida House of Representatives, the Attorney General of Florida foresaw such a result when he warned of the constitutional problems that could arise from the enactment of a statute which sought to eliminate sentencing arbitrariness by enacting sentencing standards: "General Shevin. . . . 'What I'm concerned about is that you're still giving the jury the option of going back and deciding; and I think again with almost unbridled discretion, whether or not to impose the death penalty. . . . I think [this] is just a little bit chancy [sic] as to whether the court would sustain it or strike it. It's awfully sophisticated and I think just for that reason, I think when it comes before the Court on the attack, that all they're doing here

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The seventy-five histories included in Appendix A for the Court's review describe eighteen death sentence case.[46] The jury recommended and the trial judge imposed the death sentence in eight instances.[47] On ten occasions the trial judge imposed the death sentence notwithstanding the jury's recommendation of life.[48] In two cases the trial judge imposed life sentences where the jury recommended death.[49] Twenty-nine life sentences were imposed for capital crimes where the jury recommended life sentences,[50] and eleven life sentences were imposed in exchange for negotiated pleas of guilty to the charged capital crimes.[51] All defendants were convicted of capital crimes. Eighteen

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is letting the jury go back and again decide all this on a discretionary basis. I'm just afraid the Court may not see the sophistication and go ahead and strike the statute." *Hearings*, Select Committee on the Death Penalty, Florida House of Representatives, at 20-21 (August 9, 1972).

[46]Admittedly the case histories are incomplete. All capital crime convictions are not reported. Those where capital crime was charged and negotiated to a lesser offense or a jury verdict to a lesser offense are not included. The petitioner does not have access to all of the information necessary to submit a complete case history.

[47]A-33; 34; 51; 52; 56; 58, 62; 63.

[48]A-1; 2; 37; 38; 53; 55; 60; 67; 83.

[49]A-22; 65.

[50]A-4; 6; 8; 10; 11; 12; 13; 15; 16; 18; 20; 24; 27; 29; 31; 40; 42; 43; 45; 46; 67; 72; 75; 77; 79; 81; 86; 88.

[51]A-26; 32; 42; 50; 58; 66; 71; 89; 90; 91; 92. Doubtless, many capital defendants who pleaded guilty in exchange for life sentences did not appeal their convictions. This Appendix does not include those cases.

will die and fifty-seven will live. Since written findings in support of life sentences are not required it is pure speculation to suggest that the offenses for which the eighteen must die are truly distinguishable from the fifty-seven who will live. All were sentenced for capital crimes under the same statute.

The death penalty statute is not mandatory: it does not require the penalty of death for any particular conduct. Rather, it relies upon "aggravating" and "mitigating" circumstances to ferret out for execution only those guilty of "(t)he most aggravated and unmitigated" crimes.[52] But the iteration of "aggravating" and "mitigating" circumstances does not so limit sentencing discretion that the factual situation supporting a sentence of imprisonment will not also support a sentence of death. Indeed, if anything, this procedure is more arbitrary than the previous one.

> "In point of fact, a death sentence could be imposed although the entire twelve member jury had recommended a life sentence. Likewise, the judge could impose a life sentence although the entire jury had recommended death.
>
> Under the old system, a majority of the twelve member jury, in the exercise of their discretion, determined the nature of the punishment. Under the new law, to the exercise of that discretion is added the opportunity for arbitrary, completely unfettered, and final exercise of discretion by the judge. Clearly, the new law provides for even more discretion than the quantum thereof condemned in *Furman*."

State v. Dixon, supra, 283 So.2d at 26 (dissenting opinion of Mr. Justice Boyd).

[52]*State v. Dixon, supra,* 283 So.2d at 7.

The enumerated aggravating and mitigating circumstances are amenable to reasonably different subjective interpretations in accord with the different background, educations, personality patterns, and prejudices of the various persons responsible for the application of the standards.[53]

The matter of "weighing" the factors and determining their "sufficiency" is left to undirected discretion of the individual jurors and trial judge. Depending upon the jurors and judges, their biases or lack of them, and their uneven feelings about one factor as opposed to another, the decision that a defendant shall live or die is made. The possibilities of variation in the process of "weighing" and appraising factors are limitless, and thus death sentences imposed in this fashion will be discretionarily imposed. One jury or trial judge may find one aggravating factor "sufficient" to warrant the death sentence while another finds it insufficient. One mitigating factor of great weight in a particular juries' or juror's or judge's view may be deemed "sufficient" to "outweigh" two aggravating factors while others may view it differently. The meaning of the word "sufficient" is nowhere developed in the statute, yet it is obviously the core of the matter. For what may be sufficient basis to one jury or trial judge to give death may not be sufficient

[53]The same facts that could be taken to justify a finding of aggravation under §921.141(5)(d) ("an accomplice in the commission of . . .") could be differently interpreted in support of a finding of mitigation under §921.141(6)(d) ("an accomplice in the capital crime . . .").

to another.[54] The jury's advisory sentencing verdict introduces unnecessary discretion into the sentencing procedure because the statute gives no guidance regarding its relevance.[55] The verdict is merely an

[54]Unfortunately, the statute does not provide a uniform procedure for sentencers to follow when weighing the aggravating and mitigating circumstances. The majority in *Dixon* stated that "the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances. . . ." at 10. But if it is not a counting process, what is it? Without some legislative formulation of the combination of circumstances that justify executing or not executing a defendant, the decision to execute is a function of the sentencer's discretion and nothing more. There are three reasons why the mere requirement that the sufficiency of the aggravating and mitigating circumstances be weighed does not effectively limit the sentencer's discretion. First, nowhere in the statute is the meaning of the word "sufficient" developed, yet it is obviously the core of the matter. Secondly, the statute fails to assign, or even indicate, the relative weights of the various enumerated circumstances. Finally, the statute does not ordain what combination of mitigating circumstances will outweigh what combination of aggravating circumstances.

Note, *Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism,* 2 FLA.ST.L.REV. 108, 139-40 (1974) (Footnote omitted).

[55]*Thompson v. State,* (Fla. Sup. Ct. slip opinion filed Jan. 21, 1976)

> This court is well aware that the recommendation of sentence by the jury is only advisory and is not binding on the trial court. However, the advisory opinion of the jury must be given serious consideration, or there would be no reason for the legislature to have placed such a requirement in the statute. Obviously, some trial judges will afford great deference to the jury recommendation, while others will not.

enigmatic statement that the majority recommended life or death. the basis for the recommendation need not be given. Hopefully, the jury will consider the enumerated aggravating and mitigating circumstances, but the statute nowhere directs that the jury may not consider other factors.

In short, any capital defendant becomes a candidate for the death penalty or for life imprisonment with total discretion in the jurors and trial judge to determine whether any particular defendant shall be put to death. In the words of Mr. Justice White, concurring in *Furman*, the statute is one in which "the legislature does not itself mandate the penalty in any particular class or kind of case (that is, legislative will is not frustrated if the penalty is never imposed), but delegates to judges or juries the decisions as to those case, if any, in which the penalty will be utilized"' *Id.*, 408 U.S. at 311. The Florida legislature "has not ordained that death shall be the automatic punishment for murder" rather, the legislature has preserved the "sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed" (emphasis added). *Id.*, 408 U.S. at 308, 310 (concurring opinion of Mr. Justice Stewart).

Finally, the 1972 Florida Capital Punishment Act purports to differ from its unconstitutional predecessor by virtue of the fact that it vests the ultimate decision whether a capital defendant will live or die with the trial judge rather than the jury.[56] To that assertation,

[56]This Court has already made clear that the principle of *Furman* applies to sentencing by judges as well as by juries. *See, e.g., Alvarez v. Nebraska*, 408 U.S. 937 (1972); *Miller v. Maryland*, 408 U.S. 934 (1972); *Steigler v. Delaware*, 408 U.S. 939 (1972).

the trial judge who originally declared the statute unconstitutional said:

> This is a distinction without a difference. The evil condemned in *Furman* was discretion; hence the ruling in *Furman* is applicable here.[57]

The learned trial judge's observation is beyond challenge.

B. APPELLATE REVIEW OF DEATH SENTENCES UNDER THE NEW FLORIDA STATUTE PROVIDES NO MEANINGFUL PROTECTION FROM ARBITRARY APPLICATION OF THE DEATH PENALTY.

Petitioner's sentence of death under the new Florida statute was automatically reviewed by the Supreme Court of Florida. Fla. Stat. Ann. §921.141(4)(1975-1976 Supp.); Fla. Const., Art. V, §3(b)(1).[58] The Supreme Court of Florida has observed that this appellate review is intended to provide the last of several "concrete safe-guards beyond those of the trial system to protect [a defendant]...from death where a less harsh punishment might be sufficient." *State v. Dixon, supra*, 283 So.2d at 7.

"Again, the sole purpose of...[this appellate

[57]*State v. Dixon, et al.*, Case No. 73-100(a)(b)(c) (Eleventh Judicial Circuit Court in and For Dade County, Fla., decided March 9, 1973). Paul Baker, Circuit Judge.

[58]Under Florida's pre-*Furman* capital sentencing procedure, jurisdiction to review death sentences was vested, as a matter of right, in the Florida Supreme Court. Fla. Const., Art. V., §4(2)(1968).

review] is to provide the convicted defendant with one final hearing before death is imposed. Thus, it again presents evidence of legislative intent to extract the penalty of death for only the most aggravating, the most indefensible of crimes."

Id., 283 So.2d at 8.

The *Dixon* majority was heedless of Mr. Justice Ervin's warning that: "Appellate review of the issue of punishment was provided for by several statutes which were found to be unconstitutional as a result of *Furman.*" *Id.*, 283 So.2d at 18 (footnote omitted) (dissenting opinion). The principles of *Furman* were specifically applied by this Court in reversing death sentences in cases in which the state appellate courts had, pursuant to statute, reviewed and affirmed sentences upon the express ground that the facts and circumstances warranted the ultimate penalty.[59] This

[59]See, *e.g.*, *Alford v. Eyman*, 408 U.S. 939 (1972), reversing Judge imposed death sentence upheld by the State Supreme Court in *State v. Alford*, 98 Ariz. 124, 402 P.2d 551, 557 (1965).

Kruchten v. Eyman, 408 U.S. 934 (1972), reversing Judge imposed death sentence upheld by the State Supreme Court in *State v. Kruchten*, 101 Ariz. 186, 417 P.2d 510 (1966). *See* ARIZ. REV. STAT. § 13-1717.

Hurst v. Illinois, 408 U.S. 935 (1972) reversing death sentence (imposed by jury and sustained by trial judge) upheld in *People v. Hurst*, 42 Ill. 2d 217, 247 N.E. 2d 614 (1969).

Alvarez v. Nebraska, 408 U.S. 937 (1972) reversing Judge imposed death sentence upheld in *State v. Alvarez*, 182 Neb. 358, 154 N.W.2d 746, 748 (1968): "We have been unable to find any mitigating circumstances for the murder in the facts establishing the murder itself." *Pope v. Nebraska*, 408 U.S. 933 (1972) reversing Judge imposed death sentence upheld in *State v.*

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court reversed these sentences even though these same state appellate courts had adopted a regular practice of reversing death sentences found to be unwarranted upon a consideration of aggravating and mitigating circumstances.[60]

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Pope, 186 Neb. 489, 184 N.W.2d 395 (1971). *See* NEB. REV. STAT. §29-2308.

Fesmire v. Oklahoma, 408 U.S. 935 (1972), reversing Judge imposed death sentence upheld in *Fesmire v. State*, 456 P.2d 573, 586-587 (Okla. Ct. Cr. App. 1969): "It does not appear that the defendant's friend . . . performed any act or deed which might be considered in mitigating the punishment of his murder . . ." *Menthen v. Oklahoma*, 408 U.S. 940 (1972), reversing Judge imposed death sentence upheld in *Menthen v. State*, 492 P.2d 351 (Okla. Ct. Cr. App. 1971): "As to the defendant's contention that the punishment was excessive, the brutality with which the innocent child was mutilated and slain, as evidenced by the exhibits and record before us, leads us to the conclusion that the judgment and sentence entered by the trial court was proper, and not excessive."

Phelan v. Brierly, 408 U.S. 939 (1972), reversing Judge imposed death sentence upheld in *Commonwealth v. Phelan*, 427 Pa. 265, 234 A.2d 540 (1967).

[60]See, e.g., *State v. Maloney*, 105 Ariz. 348, 464 P.2d 793 (1970) (reversing death sentence on grounds that the mitigating circumstances of defendant's young age outweighed the atrocity of the crime); *State v. Valenzuela*, 93 Ariz. 189, 403 P.2d 286 (1965) (reversing death sentence because of disparity between sentence imposed upon codefendant).

People v. Crews, 42 Ill.2d 60, 244 N.E.2d 593 (1969) (reversing death sentence on grounds that defendant had no prior criminal record, was well regarded by friends and was acting under the influence of drugs); *People v. Walcher*, 42 Ill.2d 159, 246 N.E.2d 256 (1969) (reversing death sentence on grounds defendant was an alcoholic.)

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1. The absence of statutory or judicial standards of review permits unequal infliction of the death penalty

The new Florida capital punishment statute provides no guidelines for appellate review of death sentences.[61]

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State v. Hall, 176 Neb. 295, 125 N.W.2d 918 (1964) (reversing death sentence on grounds that defendant was young, feeble-minded and had no previous record); *Muzik v. State*, 99 Neb. 496, 156 N.E. 1056 (1916) (reversing death sentence on grounds that defendant although legally sane was mentally abnormal).

Lewis v. State, 451 P.2d 399 (Okla.Ct.Cr.App. 1969) (reversing death sentence on grounds that defendant's participation in felony murder was that of minor accomplice); *Williams v. State*, 205 P.2d 524 (Okla.Ct.Cr. App.1949) (reversing death sentence on grounds that defendant had limited education and was intoxicated at time of crime); *Waters v. State*, 197 P.2d 299 (Okla.Ct.Cr.App.1948) (reversing death sentence on ground that defendant did not have bad record and victim was engaged in illegal activity when killed).

Commonwealth v. Green, 396 Pa. 137, 151 A.2d 241 (1951) (reversing death sentence on grounds of youth of defendant and his low intelligence); *Commonwealth v. Irelan*, 241 Pa. 43, 17 A.2d 897 (1941) (reversing death sentence on grounds that defendant was a devoted mother, had good reputation, was in desperate financial situation, and was poorly educated); *Commonwealth v. Garramone*, 307 Pa. 507, 161 A.733 (1932) (reversing death sentence on grounds that defendant was of good character and without criminal record and that there was provocation present.

[61]Prior to the 1972 statute, the rule in Florida was that appellate courts lacked authority to reduce sentences on grounds of excessiveness, where the sentence fell within the limits defined by statute. *Brown v. State*, 152 Fla. 853, 13 So.2d 458, 461-62 (1943). In *Davis v. State*, 123 So.2d 703, 707 (Fla.1960), for

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No judicially devised standards of review have emerged from the nineteen cases in which the Florida Supreme Court has construed the statute.[62] While the Court has

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example, the Florida Supreme Court declined to reduce the death sentence of a defendant condemned for rape, ruling that "[i]n a long adhered to line of cases, we have held that where a sentence is within the statutory limit, the extent of it cannot be reviewed on appeal regardless of the existence or nonexistence of mitigating circumstances. . . . [The statute setting the penalty for rape] fixes the maximum penalty for the offense of the appellant at death, and since this is within the statutory limit, it is not reviewable." *See also De Loach v. State*, 232 So.2d 765, 766, (Fla.1970); *La Barbara v. State*, 63 So.2d 654,655 (Fla. 1953); *Le Prell v. State*, 124 So.2d 18,19 (Fla.App.1960). The post-*Furman* capital punishment statute does not explicitly authorize the Florida Supreme Court to review the exercise of trial judge's sentencing discretion, but the Florida Supreme Court has exercised both procedural, see *Taylor v. State*, 294 So.2d 648,651 (Fla.1974) ("[f]rom our reading of the record it appears that the trial judge in his haste to impose sentence may not have properly considered the mitigating circumstances enumerated by the statute and found in the record'), and substantive, *see Tedder v. State*, 322 So.2d 908 (Fla. 1975); *Halliwell v. State*, 323 So.2d 557 (Fla. 1975), review of death sentence imposed under the 1972 legislation.

[62]*Darden v. State*, Fla.Sup.Ct., No. 45-056 (Feb.18, 1976); *Douglas v. State*, Fla.Sup.Ct., No. 44,864 (Feb.18,1976); *Thompson v. State*, Fla.Sup.Ct., No. 45,107 (Jan.21, 1976); *Dobbert v. State*, Fla.Sup.Ct., No. 45,558 (Jan.14,1976); *Halliwell v. State*, 323 So.2d 557 (Fla.1975); *Tedder v. State*, 322 So.2d 908 (Fla.1975); *Alvord v. State*, 322 So.2d 533 (Fla..1975); *Songer v. State*, 322 So.2d 481 (Fla.1975); *Swan v. State*, 322 So.2d 485 (Fla. 1975); *Slater v. State*, 316 So.2d 539 (Fla.1975); *Proffitt v. State*, 315 So.2d 461 (Fla.1974); *Sawyer*, 313 So.2d 680 (Fla.1975); *Gardner v. State*, 313 So.2d 675 (Fla.1975); *Spinkellink v. State*, 313 So.2d 666 (Fla.1974); *Alford v. State*,

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thus far affirmed twelve death sentences and reversed seven death sentences,[63] none of its written opinions offers the slightest explanation of why "a less harsh penalty [is not] . . . sufficient," *State v. Dixon, supra,* 283 So.2d at 7, or the least explanation of any other reasoned grounds or principles for deciding why one capital defendant is saved while another must die. The Florida Justices have merely recognized their responsibility for appellate review of death sentences, and implicitly, that their review adds yet another level of discretion to the procedure. Indeed, in *State v. Alvord,* 322 So.2d 533, 540 (Fla.1975), the Court expressed the nature of its review: "It is our responsibility to review the sentence in the light of the facts presented in the evidence, as well as other decisions, and determine whether or not the punishment is too great."[64] In *Songer v. State,* 322 So.2d 481, 484

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307 So.2d 433 (Fla.1975); *Hallman v. State,* 305 So.2d 180 (Fla.1974); *Sullivan v. State,* 303 So.2d 632 (Fla.1974); *Lamadline v. State,* 303 So.2d 17 (Fla.1974); *Taylor v. State,* 294 So.2d 648 (Fla.1974). *See also, State v. Dixon,* 283 So.2d 1 (Fla.1973) (Pre-trial certification).

[63]The Court affirmed the death sentences imposed upon appellants Darden, Douglas, Dobbert, Alvord, Songer, Proffitt, Sawyer, Gardner, Spinkellink, Alford, Hallman, and Sullivan. The Court reversed death sentences imposed upon appellants Thompson, Halliwell, Tedder, Swan, Slater, La Madline, and Taylor.

[64]Mr. Justice England has referred to the Florida capital procedure as "trifurcated": "The sentence procedures set out in the act are usually described as 'bifurcated'. In reality, however, the statute creates three tiers in the sentencing process–the jury, the judge, and this Court." *Alvord v. State,* 322 So.2d 533,542 n.10 (Fla.1975) (dissenting opinion).

(Fla.1975) (footnote omitted) the Court emphasized that "[w]hen the death penalty has been imposed, this Court has a separate responsibility to determine independently whether the imposition of the ultimate penalty is warranted."

2. The Florida procedure limiting appellate review only to death sentences fails to provide means for the court to determine if death is being uniformly and non-arbitrarily applied.

The development of an accurate, reliable and rational standard for review of sentences imposed in comparable cases under similar factual circumstances is impossible under the new Florida death penalty statute.[65] Under the new statute, there is no appellate review by the Florida Supreme Court when a sentence of life imprisonment, rather than the death penalty, is imposed by the trial judge in a capital case; such cases are not appealable by right to the Florida Supreme Court. *See* Fla. Const. Art. V §3(b)(1). Moreover, no reasons need be assigned by aa judge to explain a life sentence. Even if a lesser sentence for first degree murder or some lesser homicide offense is abritrary, atypical, or

[65]The Florida Supreme Court opined in *State v. Dixon, supra,* 283 So.2d at 10: "Review by this Court guarantees that the reasons [for imposing the death sentence] present in one case will reach a similar result to that reached under similar circumstances in another case." However, Mr. Justice England has pointed out that "The statute defies uniformity at the outset by limiting our review to only the capital cases where the judge imposes death." *Alvord v. State,* 322 So.2d 533,542 n.11 (Fla.1975) (dissenting opinion). "Since we do not have jurisdiction to review capital cases resulting in a sentence of life

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discriminatory, it cannot be modified on appeal since neither the Florida Supreme Court nor the Courts of Appeal are authorized to impose a death sentence or to vacate a life sentence and remand for resentencing in the event a life sentence is irrationally or arbitrarily imposed. *See* note 61, *supra.* Consequently, another "infirmity in Florida's appellate review provision is that review by the supreme court cannot protect against arbitrary mitigation of the death penalty at the trial court level... [E]ven if all those executed are found by the supreme court to be guilty of the most 'aggravated' and 'indefensible' crimes, some of those spared at the trial court level may also be guilty of that same quality of criminal activity."[66] Overlooking the question whether appellate review of any sort could save unregulated and arbitrary trial court death-sentencing decisions from condemnation under *Furman,*[67] it is manifest that the sort of review

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imprisonment (absent some other basis for our jurisdiction), we have no idea how many persons convicted of capital crimes have avoided a judge's sentence of death. Nor do we know what the juries recommended in those cases." *Id.* at 542 n.2.

[66]Note, *Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism,* 2 FLA.ST.L.REV. 108,147 (1974) (footnotes omitted).

[67]If the trial procedures afforded by the Florida capital punishment statute are arbitrary in violation of the Eighth Amendment rights of capital defendants, it is questionable whether any appellate procedures can rectify the error. "The law itself must save the parties' rights, and not leave them to the discretion of the court as such." *Louisville & Nashville Ry.Co. v. Central Stock Yards Co.,* 212 U.S. 132,144 (1909). Five years later, Justice Holmes cited this quotation from the *Central Stock*

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provided by and practice under the present Florida Statute is wholly ineffective for that purpose.

3. The Florida proceeding defies uniformity at the outset by limiting Supreme Court review only to capital cases resulting in death sentences.

The factual circumstances which gave rise to the death sentence in Petitioner's case are not dissimilar to those present in other cases which resulted in the imposition of life sentences. For instance, Michael Powers was convicted of Murder in the First Degree and Robbery of a 50 year old store owner. The jury recommended and the Court sentenced Powers to life imprisonment. The eivdence indicated that Powers stated before entering the victim's store that it was his intent to kill the proprietor. Upon entering the store he forced the proprietor to the rear of the building, directed him to sit on a box and then fired three shots into the victim's head, killing him instantly. While in jail, Powers made numerous statements that he intended to and was glad he shot the old man. (*See* – Appendix A at A-27)

Another life sentence was imposed for First Degree Murder where the victim, a taxi cab driver, was shot in the head by the defendant Jolly during a robbery. While the State contended that the murder was especially heinous, atrocious and cruel, the jury recommended and the Court sentenced the defendant to life. (*See*–Appendix A at A-43)

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Yards case and concluded: "[t]he point there was that a defect in a law could not be cured by precautions in a judgment." *International Harvester v. Kentucky,* 234 U.S. 216,220 (1914).

The Defendant Zadnick received two life sentences imposed by the Court where the jury recommended death for the beating and stabbing deaths of the Defendant's girl friend and her 5 year old son. The trial Judge, in overruling the jury's death recommendation, observed that the crime was not particularly heinous, atrocious and cruel. (*See*–Appendix A at A-22)

The Circuit Court in Hillsborough County (the same court which sentenced the Petitioner) imposed two concurrent life sentences upon Defendant McMahon upon his plea of guilty to two First Degree Murders for the killing of two young girls, ages 5 and 13. The evidence indicated that the Defendant drove his vehicle to the opposite side of the street and off the roadway running over the two girls and their brother. The Defendant immediately stopped the car and threw the older girl into the car and sped away. Two days later the 13 year old was dicovered with her panties off but no eivdence of sexual molestation. McMahon turned himself in to law enforcement officer ten days after the crime. (*See*–Appendix A at A-32)

Defendant Gould stabbed an elderly woman when she allegedly caught him shoplifting, and after the murder he took money from the cash register. It appeared that Gould had a bad record with convictions of other significant crimes but was allowed to enter a negotiated plea to murder in the first degree and to other crimes in exchange for a plea for life sentence. (*See*–Appendix A at A-85)

In another Hillsborough County case, Defendant Tillman along with Defendant Witt abducted an 11 year old boy, took him to an orange grove, sexually molested him, beat him repeatedly with a heavy metal star drill, cut over his stomach in "field dress" style, dismembered his body and buried him in a shallow grave. The co-defendant cut off the boy's penis and

placed it in a glass bottle and took the bottle home. Tillman pled guilty to First Degree Murder in exchange for a life sentence. His accomplice, Witt, was convicted by a jury and received the death penalty. (*See*–Appendix A at A-58)

Defendant Elley and two other men kidnapped an elderly woman, forced her into Defendant's car, drove to an isolated area, robbed her of her jewelry and money, strangled and beat her to death. He received a life sentence in exchange for a plea of guilty. (*See*–Appendix A at 4-42)

Peoples stationed himself at a second story window across the street from his girl friend's house where she sat on the porch with the victim. Peoples shot the victim in the head. The state stipulated that there were no aggravating circumstances warranting the imposition of the death penalty. The jury recommended death. However, a life sentence was imposed by the same judge who sentenced Petitioner to death. (*See* Appendix A at A-65)

Because the circumstances which exist in capital cases may, and more often do, result in life sentences which are not reviewed by the Florida Supreme Court, the Court cannot begin to fulfill its commitment to guarantee "that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case." *State v. Dixon, supra,* 283 So.2d at 10.

4. The decisions of the Florida Supreme Court do not reveal any rational distinction between the death sentences which have been reversed and those which have been affirmed.

Examination of the sentencing decisions of the Florida Supreme Court shows that the Court has reached different decisions in cases which are factually similar and that it has reversed death sentences in cases that involve more aggravated factual circumstances than in cases where it has affirmed death sentences.

The Court affirmed a death sentence in *Gardner v. State*, 313 So.2d 675 (Fla.1975), where appellant, in a drunken stupor, had brutally beaten his wife to death. The evidence revealed that appellant had been drinking heavily for the twenty-four hours before the killing, that he had fallen asleep with his wife's dead body, that he had sought help for her the next morning, "because his wife did not appear to be breathing properly," 313 So.2d at 679, that he made no attempt to escape, and that he exhibited remorse upon learning that his wife was dead. *See* 313 So.2d at 678-679. The jury recommended mercy, but the Court affirmed the trial court's imposition of a death sentence. In dissent, Mr. Justice Ervin declared, "I do not believe that the statutes contemplate that a crime of this nature is intended to be included in the heinous category warranting the death penalty. A drunken spree in which one of the spouses in killed traditionally has not resulted in the death penalty in this state.[68] . . . [T]his

[68]Mr. Justice Ervin's perception is clearly correct, and the *Gardner* sentencing jury appears to have reflected community sentiment in its advisory verdict. The appellate reports for the year 1975 reveal a number of second degree murder convictions (*Lattimore v. Florida*, 323 So.2d 5 (Fla.App.1975); *Beasley v. State*, 315 So.2d 540 (Fla.App.1975); *Smith v. State*, 314 So.2d 226 (Fla.App.1975); *Calvo v. State*, 313 So.2d 39 (Fla. App.1975); *McCrae v. State*, 313 So.2d 429 (Fla.App.1975);

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cause involv[es] a crime of passion in a drunken 'spree." 313 So.2d at 679.

There is no way to meaningfully distinguish *Taylor v. State, supra*, from *Sawyer v. State*, 313 So.2d 680 (Fla.1955). In both cases, the defendants were convicted of slaying liquor store clerks during the course of an armed robbery. In both cases, more than one armed robber participated in the crime,[69] and there was evident resistence by the store personnel. In neither case was it established that the defendant intentionally shot the victim.[70] In both cases, the

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Noel v. State, 311 So.2d 182 (Fla.App.1975); *Melero v. State*, 306 So.2d 603 (Fla.App. 1975)) and manslaughter convictions (*Hanna v. State*, 319 So.2d 586 (Fla. App.1975); *Robbins v. State*, 312 So.2d 243 (Fla.App.1975)) where defendants have slain their spouse or lover, with varying degrees of aggravation, but *Gardner* is the only case in which a death penalty was imposed for such a homicide.

[69]Sawyer, one Lester, and one Dixon, (in whose pre-trial appeal, with Sawyer's, the Florida Supreme Court first upheld the constitutionality of the Florida death penalty statute, *State v. Dixon*, 283 So.2d 1 (Fla.1973)) were charged with the same felony murder arising out of the liquor store robbery for which a death penalty was imposed in *State v. Sawyer*. Both Dixon and Lester were acquitted. See *State v. Dixon*, Cir.Ct., 13th Jud. Cir. (Dade Co.), No. 73-1001(a), (Jan.11,1974), and *State v. Lester*, Cir. Ct., 13th Jud.Cir., (Dade Co.), No. 73-1001(b), (Nov.6, 1975).

[70]In *Taylor*, the evidence clearly suggested that the defendant did not fire the fatal shot. *Taylor v. State, supra*, 294 So.2d at 652. In *Sawyer*, the fatal shot was fired from appellant's gun during a struggle with someone who was *not* the victim of the shooting. *Sawyer v. State, supra*, 313 So.2d at 680. Under the

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sentencing juries unanimously recommended life imprisonment, and the trial court imposed the death penalty. Yet in *Taylor*, the Florida Supreme Court reversed the death penalty, and in *Sawyer*, it affirmed the trial court's sentence (on the basis of "aggravating circumstances" not specified in the Florida capital punishment statute).

In *Halliwell v. State*, 323 So.2d 557 (Fla.1975) the Court reversed a death sentence (in a case where the jury had *recommended* death) imposed upon a defendant who had been convicted of murdering his paramour's husband. Defendant had beaten the victim to death with an iron bar and had then hacked the body into several pieces. The gruesome details of the slaying are recounted in the Florida Supreme Court's opinion:

> On January 17, 1974, the dismembered body of Arnold Tresch was found in Cypress Creek. . .The upper torso was in a garbage can. . .The lower torso and the amputated legs were found nearby in Appellant's footlocker. . .After killing Tresch on the morning of January 9, 1974, Appellant confessed that he stored the body until he could find time to dismember it, conceal the pieces and remove them to Cypress Creek the following day. . .[H]is shop was searched with his written permission, the detective finding blood on the floor as well as bloody human flesh on a saw, a machete and a bloody breaker bar which the

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established doctrine of felony-murder, of course, no finding of intent or premeditation is necessary to justify a conviction for first degree murder, and one felon may be held vicariously liable for an unintentional killing by a co-felon during the course of the felony.

> Appellant said later was the death weapon. . . .Appellant. . .confessed. . .that he had beaten him [Tresch] to death, unable to stop the fatal blows once he began. . . .Appellant [had] grabbed a 19-inch breaker bar and beat the husband's skull with lethal blows and then continued beating, bruising and cutting the husband's body with the metal bar after the first fatal injuries to the brain."

323 So.2d at 559, 561. The Florida Supreme Court reversed the death penalty which had been recommended by the jury and imposed by the trial judge, ruling that "a finding of premeditated murder [was justified], but we see nothing more shocking in the actual killing than in a majority of murder cases reviewed by this Court." 323 So.2d at 561.[71] Inexpliciably, however, the Court affirmed a death sentence in *Spinkellink v. State*, 313 So.2d 666 (Fla. 1975) in which the murder had also been found to be "especially heinous, atrocious, or cruel" by the trial court, in a case where there had been considerable provocation for the killing (the defendant Spinkellink had been homosexually assaulted, robbed and forced to play Russian Roulette by the deceased).

Without the articulation of any legislative standards, the enunciation of a reasoned opinion on capital

[71] As in *Taylor v. State, supra*, the Court speculated as to the reasons for the jury's advisory verdict of death: "We cannot read the minds of jurors, but it is reasonable to suspect that the hideous and gruesome conduct of the Appellant in dismembering the body several hours after the murder probably was considered by the jury in recommending the death penalty." *Halliwell v. State, supra*, 323 So.2d at 561. Again, there is simply no way to fathom the reasons for the jury's recommendations, and the Florida Supreme Court offers scant explanation for the result of its review of the sentence.

sentencing, a discussion of the factual circumstances justifying or failing to justify the sentence in a particular case, and an analysis of sentences imposed in comparable cases, it is impossible to ascertain whether or not the imposition and affirmance of a death sentence in a particular case is arbitrary and whether death is indeed being inflicted "for only the most aggravated, the most indefensible of crimes." *State v. Dixon, supra,* 283 So.2d at 7.[72]

[72]The other flaws in the Florida Statute, previously discussed, make impossible the provision of any meaningful appellate review, of course. This is evident in, for example, *Taylor v. State,* 294 So.2d 648 (Fla.1974), where the Florida Supreme Court reversed a death sentence in a case where the advisory jury had recommended mercy but the trial court condemned the defendant. No additional evidence had been offered in aggravation or mitigation at the sentencing hearing. 294 So.2d at 651. The Court relied on the advisory jury verdict (which it could not possibly explicate, since it consisted simply of a recommendation of mercy, with no analysis of mitigating circumstances which the jury found) in its decision and it enumerated certain mitigating circumstances (some of them non-statutory) which *might* have been found on the basis of the evidence introduced, 294 So.2d at 652. It concluded: "From our reading of the record it appears that the trial judge in his haste to impose sentence may not have properly considered the mitigating circumstances enumerated by the statute and found in the record . . . All of this [the mitigating circumstances which might possibly have been found] taken together could have *substantially impaired* the rationality of appellant to the point where the jury, believing his complicity, nevertheless rejected the idea of the imposition of the ultimate penalty." 294 So.2d at 651-652 (emphasis in original). Of course the Court necessarily had to speculate as to the nature of the jury's advisory decision: the jury could have found a number of aggravating circumstances, but determined that death was not warranted: it could

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5. Affirmance of petitioner's death sentence by the Florida Supreme Court illustrates the arbitrary application of the death penalty.

In Petitioner's state appeal, the Florida Supreme Court did not review the "case in light of other decision and determine whether the punishment is too great." *State v. Dixon, supra,* 283 So.2d at 10. Rather, the Court's review of the Petitioner's death sentence consisted of a mere recitation of the judge's written findings as to aggravating and mitigating circumstances and a shallow holding that "[w]e must obviously conclude that no error was committed." *Proffitt v. State, supra,* 315 So.2d at 466-467. Close comparison of this case with other Florida death cases reveals an utter failure of meaningful review of the reasons that Petitioner has been slected to die.

For example, the Florida Supreme Court concurred with the judge's finding in aggravation that "the murder of. . .[the victim by the Petitioner] was especially heinous, atrocious and cruel." *Id.,* 315 So.2d at 466. However, Medgebow's death resulted from a single stab wound. (R216, 119) The circumstances of this case fall far short of the Florida Supreme Court's initial construction of the meaning of an "especially heinous, atrocious or cruel" capital felony:

> It is our interpretation that heinous means

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have voted to spare defendant on the basis of non-statutory mitigating circumstances–because he was personally sympathetic, because he was afflicted with a drug habit, because accomplices also participated in the crime, or because the killing was unintentional.

> extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

State v. Dixon, supra, 283 So.2d at 9. Indeed, in *Swann v. State, supra,* the Court vacated a death sentence imposed upon a burgular who, with a confederate, administered a fatally "severe beating," 322 So.2d at 486, and "torture," 322 So.2d at 487, to a forty-nine year old female housekeeper, even though the trial court had found that the crime was "outrageously wicked, vile, atrocious, cruel and heinous." 322 So.2d at 489. In *Halliwell v. State, supra,* where the jury recommended death and the trial court found the fatal beating and dismemberment of the victim to have been committed "in an extremely heinous, atrocious and cruel manner," 323 So.2d 561, the Florida Supreme Court reasoned that the actual killing was no more shocking than the majority of murder cases reviewed and concluded "that the death penalty is not warranted." *Id.* If the brutal slayings in *Swan* and *Halliwell* were not "expecially heinous, atrocious and cruel" murders, then the death of Mr. Medgebow from a single stab wound cannot be, and the facts here do not "set the crime apart

> "That the capital felony for which. . .[the Petitioner] was convicted was not committed while the

> [Petitioner] was under the influence of extreme mental or emotional disturbance.
>
> . . . . .
>
> That at the time of the commission of the offense the [Petitioner's] capacity to appreciate the criminality to [sic] the requirements of law was *not* substantially impaired."

Proffitt v. State, supra, 315 So.2d at 466-467. At the sentencing proceeding, a psychiatrist who had examined the Petitioner testified that he was "certain that [Petitioner] was under an intense amount of uncontrollable emotional stress" (R503) at the time of the offense.

> Q. Doctor, do you have an opinion as to whether or not the defendant could conform his conduct to the requirements of law, at the time he committed the offense or whether his ability to do that was substantially impaired?
>
> A. I'm certain that at the moment and at the time that this occurred this individual was overwhelmed with the force over which he had no control and to which he must carry out the deed.
>
> Q. So that he was unable to conform his conduct to the requirements of law?
>
> A. That is correct. (R504, 505).

Nonetheless, the Florida Supreme Court approved the judge's findings that the quoted mitigating circumstances were not shown to exist. Yet in *Halliwell v. State, supra,* the Court reversed a death sentence recommended by the jury and imposed by the trial judge where the police officer (not a psychiatrist) testified that Halliwell was "under emotional strain over the mistreatment of Sandra [the decedent's wife] by the victim and that Appellant was greatly influenced by

her." 323 So.2d at 557. Thus, even though there was competent, expert testimony that Petitioner was under the influence of "an intense amount of uncontrollable emotional stress" (R503) to the extent that his ability to conform his conduct to the requirements of law was substantially impaired (R504), he is condemned to die while Mr. Halliwell has been spared.

Finally, the Florida Supreme Court affirmed the trial court's finding in aggravation:

> "That the [Petitioner] knowingly through his voluntary and intentional acts leading up to and during the course of the commission of the offense for which he was convicted created a great risk to [sic] serious bodily harm and death to many persons.

Proffitt v. State, supra, 315 So.2d at 466. Joel Medgebow's killer struck Mrs. Medgebow, who did not herself sustain "serious bodily harm"[73] or death, although she was bruised. (R280) How can it be said, beyond a reasonable doubt, that the assailant knowingly created a great risk of serious bodily harm and death to many persons when the only other persom with whom he came into contact escaped relatively unscratched? Indeed, a lone man, inflicting a single stab wound to only one person simply does *not* constitute "a great risk of death to many persons."[74] A true risk of death

[73]The statute does not list great risk of "serious bodily harm" to many persons as an aggravating circumstance. See Stat.Ann. §921.141(5)(c) (1975-1976 Supp.).

[74]Hearings in the Florida Legislature preceding passage of the present death penalty statute indicate that this aggravating circumstance (§921.141(5)(c)) was directed at wanton acts

(continued)

to many persons existed in *Tedder v. State, supra,* where the appellant fired a shot at his wife, infant son and mother-in-law during a marital dispute and then fatally wounded his mother-in-law. In imposing the death sentence the trial court found in aggravation that Tedder had "knowingly created a great risk of death to many persons." 322 So.2d at 910. The Florida Supreme Court reversed the death sentence, agreeing with Tedder that a life sentence should have been imposed. The Court knew that Tedder had knowingly endangered the lives of two persons other than the victim, and that there was no evidence that Petitioner even threatened Mrs. Medgebow with a knife. Yet, the Court reversed Tedder's death sentence and condemned the Petitioner to die.

Thus, there appears no rational explanation as to why the Petitioner must suffer the death penalty while convicted murderers Swan, Halliwell and Tedder were spared after the discretionary review by the Florida Supreme Court. The reasoning and standards the Court applies to factually similar cases remain baffling and arbitrary.

The Florida Supreme Court has candidly recognized that the 1972 death penalty statute has not regularized the imposition of capital punishment to guarantee that those condemned are not simply "a capriciously selected random handful upon whom the sentence of death has in fact been imposed," *Furman v. Georgia,*

(footnote continued from preceding page)

endangering the public such as hijacking an airplane, shooting into a crowd, or bombing a public place. *See* Hearings Select Committee on the Death Penalty, Florida House or Representatives, at 66 (Aug. 4, 1972).

408 U.S. 238, 309-310 (1972) (concurring opinion of Mr. Justice Stewart) (footnote omitted):

> "There is no way that the Legislature could program a judicial computer with all of the possible aggravating factors and all of the possible mitigating factors in each case. See *State v. Dixon, supra.* The law does not require that capital punishment be imposed in every conviction in which a particular state of facts occur. The statute properly allows some discretion, but requires that this discretion be reasonable and controlled. No defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors. However, this does not mean that in every instance under a set state of facts the defendant must suffer capital punishment . . . Certain factual situations may warrant the infliction of capital punishment, but nevertheless, would not prevent either the trial jury, the trial judge, or this Court from exercising reasoned judgment in reducing the sentence to life imprisonment. Such an exercise of mercy on behalf of the defendant in one case does not prevent the imposition of death by capital punishment in the other case."

Alvord v. State, 322 So.2d 533, 540 (Fla. 2975). The Florida procedure is thus utterly unfitted to "reserve [the] . . . application [of capital punishment] to only the most aggravated and unmitigaged of [the] most serious crimes" *State v. Dixon, supra*, 283 So.2d at 7. The "concrete safeguards", *Id.*, of the new Florida law are illusory. The Florida Supreme Court's independent review of death sentences, *see Songer v. State, supra*, 322 So.2d at 484, merely injects yet a third level of human discretion into the capital sentencing process.[75]

[75]See *Alvord v. State, supra*, 322 So.2d at 542 (dissenting opinion of Mr. Justice England).

Thus, appellate review by the Florida Supreme Court provides "no meaningful basis for distinguishing the few cases in which [the death penalty] . . . is imposed from the many cases in which it is not." *Furman v. Georgia, supra*, 408 U.S. at 313 (concurring opinion of Mr. Justice White).

C. PRE-SENTENCE AND POST-SELECTIVE MECHANISMS PERPETRATE THE ARBITRARY INFLICTION OF THE DEATH PENALTY.

1. Prosecutorial Discretion

In Florida, the State Attorney is elected at the general election and serves for a term of four years.[76] As State Attorney, it is his duty to "appear in the Circuit and County Courts within his judicial circuit and prosecute or defend on behalf of the State all suits, applications, or motions, civil or criminal, in which the State is a party."[77] Little guidance is provided by the statutes or the rules as to how he is to accomplish these

[76]Fla. Stat. Ann., §27.01 (1973). A candidate for that office must have been a member of the Florida Bar for the preceding five years and must be a resident of the territorial jurisdiction of the circuit. Fla. Const., Art. V, Sec. 17 (1868). *See Austin v. State, ex rel Christian*, 310 So.2d 289 (Fla. 1975). No special qualifications in the area of criminal law are required. There are twenty judicial circuits in Florida and therefore, twenty different State Attorneys. Fla. Stat. Ann., §26.01, 27.01 (1973).

[77]Fla- Stat. Ann., §27.02 (1973).

duties.[78] It is clear however that he has unfettered and virtually unreviewable discretion to initiate and terminate criminal prosecutions.[79] The State Attorney:

> "[h]as been loosely referred to many times as a 'one-man grand jury'. And he is truly that. He is the investigatory and accusatory arm of our judicial system of government, subject only to the limitations imposed by the Constitution, the common law, and the statutes, for the protection of individual rights and to safeguard against the possible abuses of the far-reaching powers so confided."
>
> *Imperato v. Spicola*, 238 So.2d 503, 506 (Fla. App. 1970).
>
> "[w]ithin the limits of the constitution and applicable statutes all steps in the prosecution of persons suspected of crime are under . . . (the State Attorney's) supervision and control."

[78]Cf. Fla. R. Crim. Proc. 3.115: "The State Attorney shall provide the personnel or procedure for criminal intake in the judicial system." No further guidelines are established.

[79]The statutes defining the powers of the State's Attorney are to be "liberally construed." *Barnes v. State*, 58 So.2d 157, 159 (Fla. 1952).

> "[T]he constitution and statutes impose a duty upon the State Attorney to prosecute in the Circuit Court information or upon indictment by the grand jury. If any indictment has not been found or any information filed for such an offense, then all indictable offenses triable within the county should be presented to the grand jury by the State Attorney."

Austin v. State ex rel Christian, 310 So.2d 289 (Fla. 1975); *State vs. Mitchell*, 188 So.2d 684, 687 (Fla. App.), cert. discharged, 192 So.2d 281 (Fla. 1966). *See also Smith v. State*, 95 So.2d 525, 527 (Fla. 1957). *cf. Newton v. State*, 178 So.2d 341, 344 (Fla. 1965).

> *Collier v. Baker*, 155 Fla. 425, 20 So.2d 652, 653 (1945).

With the exception of the arresting officer, the initial determination that a particular homicide or rape is a capital offense is made by the State Attorney. He may file a direct information for less than a capital offense, or if he decides that no offense has been committed or can be proved, he may terminate the prosecution by entering a "No Bill." If he determines that no capital offense has been committed, the life of the perpetrator has, for all practical purposes, been spared.[80] If the State Attorney decides that a capital offense has been committed then, and only then, must the issue be presented to the grand jury to seek an indictment. The Florida legislature could, pursuant to its authority to prescribe the "powers and duties"[81] of the State Attorney, enact guidelines to specify when a capital indictment should be sought. To date however, neither the legislature nor the judiciary has attempted to provide the State Attorney with any guidelines or

[80]The grand jury to consider "offenses triable within the county that are presented to it by the State Attorney or his designated assistant *or otherwise come to its knowledge*". Fla. Stat. Ann., §905.16 (1973). (emphasis added). Theoretically, the grand jury may return a capital indictment for an offense which the State Attorney has already decided is not capital and which he did not present to them for their consideration. *See Johnson v. State*, 314 So. 2d 573 (Fla. 1975).

[81]*Owens v. State*, 61 So.2d 412, 414 (Fla. 1952); *See also Johns v. State*, 144 Fla. 256, 197 So. 791, 796 (1940).

[82]Discretionary prosecution in Florida is even greater in cases

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criteria which he may use in his decision whether a capital charge will be sought and prosecuted.[82]

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prosecutor nor grand jury are provided with guidelines to aid in determining which child should be indicted and which should be dealt with as a delinquent. And while it is true that in Florida involving juveniles. Fla. Stat. Ann. §39.05(5)(c) provides that the Juvenile Court is automatically divested of jurisdiction over "a child of any age" upon grand jury indictment of the child for a capital or life felony. This is in contravention of the constitutional requirement that the child must be given a hearing before the critical decision can be made whether the Juvenile Court shall waive jurisdiction over the child and the child treated in all respects as if he were an adult. This hearing must be before an impartial judge and the child afforded the full panoply of constitutional protection. *Kent v. United States*, 383 U.S. 541, 16 L.Ed.2d 84, 86 S.Ct. 1045 (1966); *In Re Gault*, 387 U.S. 1, 18 L.Ed.2d 527, 87 S.Ct. 1428 (1967); *State v. Steinhaver*, 216 So.2d 214 (Fla. 1968), conformed to 217 So.2d 590, U.S. cert. den. 398 U.S. 914; *Davis v. State*, 297 So.2d 289 (Fla. 1974). This requirement of a hearing has been implemented by Fla. Stat. Ann. §39.02(5)(a) and rules 8.100(b) and 8.110(b), Florida Rules of Juvenile Procedure. Fla. Stat. Ann. §39.02(2) provides that these hearings shall determine whether there is probable cause to believe the juvenile committed the offense charged and whether there are "reasonable prospects of rehabilitating the child to his majority." Guidelines are provided in Section 2(c) of the statute. Yet under 39.02(5)(c) the prosecutor can by-pass the hearing requirement of *Kent* and *Gualt*, *supra*, in cases of capital or life felonies by the simple expedient of securing an indictment. He has unbridled discretion over which capital or life felony to present to the grand jury and hence which juvenile to treat as an adult and which is to be charged as a delinquent. This decision is fundamentally different from other prosecutorial decisions in that a normal charging decision is only the beginning of the process of adjudication of a defendant's guilt, a process marked by the presence of all the traditional protections of procedural due process. In contrast, the waiver decision marks not only the beginning, but also the end of adjudication as to the child's suitability for juvenile treatment. Further, neither

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He may "without violating [his] trust or any statutory policy . . . refuse to [seek] the death penalty no matter what the circumstances or the crime."[83] For "the legislative will is not frustrated if the penalty is never imposed."[84] The State Attorney's power to seek or to forego capital indictments remain complete discretionary:

> " w here . . . a State Attorney's duty and authority require the examination of evidence in the determination of law and fact before taking action thereon, his duty and authority is ordinarily not strictly ministerial, but may even be quasi-judicial or discretionary in its character."

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the grand jury has theoretical power to go beyond cases presented to it by the prosecutor and initiate its own investigations and hand down indictments for the triable offenses the Supreme Court of Florida has treated equally as exercises of the prosecutor's discretion, the decision of whether to charge by indictment or information. *See Mitchell v. State*, 25 So.2d 73 (Fla. 1946). Thus, three seventeen year old children accused of a capital offense might be prosecuted in three totally different ways: the first child could be tried in a delinquency proceeding in juvenile court for a non-capital crime; the second child after hearing, could be "waived" to the adult court and tried for a non-capital crime; the third child could be indicted and tried for a capital offense. The choice is left entirely to the State Attorney and the possibilities for equal protection violations are limitless. Clearly, in Florida juvenile cases, the prosecutor has been given discretion of sufficient breadth to abrogate the mandate of the constitution of the United States. Nevertheless, this procedure has been held constitutional by the Supreme Court of Florida. *Johnson v. State*, 314 S.2d 573 (Fla. 1975)

[83] *Furman v. Georgia*, *supra*, 408 U.S. at 314 (concurring opinion of Mr. Justice White).

[84] *Id.* at 309 (concurring opinion of Mr. Justice Stewart), at 311 (concurring opinion of Mr. Justice White).

Hall v. State, 136 Fla. 644, 187 So. 392, 298 (1939).[85]

The only crimes which a State Attorney may not charge by direct information are capital crimes. These must be charged by an indictment returned by a grand jury.[86] Any grand jury, of course, has absolute discretion to indict or to refuse to indict regardless of the evidence presented to it.

Even if the grand jury returns a capital indictment, there is no guarantee that the charge will ever be considered by a petit jury. The State Attorney can terminate a criminal action whenever he determines "that the prosecution is not justified"[87] simply by entering a *nolle prosequi* in the appropriate court any time prior to the jury being sworn.[88] Permission of the trial court to take a *nolle prosequi* is not required.[89]

After having taken a *nolle prosequi*, the State Attorney is not precluded from later refiling another information or obtaining another indictment charging

[85]*Cf. Carlile v. State*, 129 Fla. 860, 176 So. 862, 863 (1937): "The State Attorney has very broad discretion in examining witnesses . . . prior to indictment." *Morgan v. State*, 309 So.2d 552 (Fla. App. 1975) held that the State Attorney does not have to "have a particular criminal statute in mind before he can interrogate a witness . . . he may be only suspicious that criminal activity has taken place."

[86]Fla. Const., Art. I, Sec. 15 (1968); Fla. R.Crim. Proc. 3.140(1).

[87]*Barnes v. State*, 58 So.2d 157, 159 (Fla. 1952). *See also Wilson v. Renfree*, 91 So.2d 857, 855-860 (Fla. 1952).

[88]State v. Sakal, 208 So.2d 156 (Fla.App. 1968).

[89]*State v. Wells*, 277 So.2d 544 (Fla.App. 1973); *State v. Fattorusso*, 228 So.2d 630 (Fla.App. 1969), *Wilk v. State*, 217 So.2d 610 (Fla. App. 1965).

the same crimes which he had previously abandoned.[90]

Furthermore, the State Attorney's discretion to plea bargain in capital cases is not only unregulated by post–*Furman* Florida Statutes and rules, but indeed, encouraged. Rule 3.170(g) Florida Rules of Criminal Procedure states:

> The defendant, with the consent of the court and of the prosecuting attorney, may plead guilty to any lesser offense than that charged which is included in the offense charged in the indictment or information or to any lesser degree of the offense charged.

Rule 3.171(a), Florida Rules of Criminal Procedure states:

> The prosecuting attorney is encouraged to discuss and agree on pleas which may be entered by a defendant. Such discussion and agreement must be conducted with the defendant's counsel or, if the defendant is unrepresented, may be conducted with the defendant.[91]

[90]Fla. R.Crim Proc. 3.191(h)(2): An accused's right to a speedy trial cannot be avoided by the State by entering a *nolle prosequi*. *See State ex rel Green v. Patterson*, 179 So.2d 544 (Fla. App. 1973).

[91]The 1972 Committee Note to this Rule correctly observes that "most criminal cases are disposed by pleas of guilty arrived by negotiations between the prosecutor and defense counsel."

THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: *The Court* 9 (1967) estimates that approximately ninety per cent of all criminal cases are resolved via plea-bargaining.

Compare Shelton v. United States, 242 F.2d 101 (5th Cir.

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If the State Attorney agrees to dispose of a potentially capital case before the return of an indictment, the "consent of the court"[92] to such an agreement can be obviated. For in Florida, defendants have a legal right to plead guilty to a criminal charge.[93]

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1957), rev. on reh. 246 F.2d 571, Rev. 356 U.S. 26 for the view that "[j]ustice and liberty are not the subject of bargaining and barter."

[92]Fla. R.Crim.Proc. 3.170(2)

Under the state attorney's authority to "contract with a criminal for his exemption from prosecution. "*Ingram v. Prescott*, 111 Fla. 320, 149 So. 369 (1933), he may file capital charges against one co-defendant but not against another equally culpable co-defendant.

[93]*Canada v. State*, 144 Fla. 633, 198 So. 220, (1940); *Eckles v. State*, 132 Fla. 526, 180 So. 764, 766 (1938). A trial court's power to reject a guilty plea is limited to those cases where the plea is "not entirely voluntary by one competent to know the consequence,' or is 'induced by the fear, misapprehension, persuasion, promises, inadvertence, or ignorance.'" *Reyes v. Kelly*, 224 So.2d 303, 305 (Fla. 1969):

> "A trial court is not authorized to arbitrarily refuse to accept an unqualified plea of guilty made by a defendant on a non-capital case for any other reason.
>
> There is no more reason to allow such action by a trial judge than there is to allow a defendant to withdraw such a plea at his pleasure. If a trial judge has the discretion to refuse only for cause permission to withdraw a plea of guilty, he should not be allowed, without cause, to reject such a plea. The right to enter such a guilty plea should be no less sacred than the right to enter a plea of not guilty."

224 So.2d at 306. See Fla. R.Crim.Proc. 3.160(c). A defendant may plead guilty to a capital offense. *Lamadline v. State*, 303 So.2d 17 (Fla. 1974). Where a defendant "plead[s] guilty in order to escape the electric chair," he gets "what he bargained for--a life sentence and . . . no right to complain." *Lewis v. State*, 93 So.2d 46, 47 (Fla. 1956).

Thus, if the State Attorney agrees to file an information for less than the capital offense in exchange for a guilty plea, the court is helpless to interfere.[94]

While the State Attorney is "encouraged" to plea-bargain, nothing in the Florida Statutes or criminal rules regulates when the State Attorney must, or must not, negotiate a plea. Yet the decision to negotiate or not to negotiate, made solely by the State Attorney, is "probably the most widely significant choice separating the doomed from those who . . . go to prison."[95] Without any guidance whatever, then, a State Attorney is free to decide whether a capital charge will be sought and prosecuted, and whether an accused will be permitted to save his own life by pleading guilty for a sentence less than the electric chair.[96] There is no

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[94]For example, the prepetrator of a potentially capital murder and the State Attorney may agree, for reasons known only to them, that the proper disposition of the case would be a plea of guilty to the charge of Battery (Fla. Stat. Ann. §784.03 (2975-76 Supp.). The State Attorney would then file an information charging battery and the defendant would announce his intention to plead guilty to that charge. The trial judge would be forced to accept the plea and that would be the end of the potentially capital murder. Of course, the judge would have the discretion to sentence up to the maximum penalty provided by law for the offense. The maximum penalty for Battery is one year in the country jail. (Fla. Stat. Ann. §775.082 (1975-76 Supp.).

[95]BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE, 43 (1974).

[96]*See e.g. State v. Riley Burchfield*, Appendix A-92.

The defendant's wife was having an affair with another man and the defendant told her that if he ever caught her. he would kill her child; his stepson. After an argument the defendant

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redress from these prosecutorial decisions for the relatively few defendants who are indicted for a capital offense and with whom the State Attorney elects not to negotiate.

2. Jury Discretion

Although express sentencing discretion is conferred upon the trial judge by Fla. Stat. Ann. § 921.141 (1975-1976 Supp.), the jury has complete discretion to spare a capital defendant's life by convicting him of a lesser offense.

The indictment in Petitioner's case charged first degree murder. It alleged:

> " . . . that CHARLES WILLIAM PROFFITT on the 10th day of July, 1973, in the County and State aforesaid, unlawfully and from a premeditated

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picked up a pistol, walked into the child's bedroom and, while the four year old boy slept, held the gun about a foot from the child's chest and pulled the trigger. Burchfield plead guilty to first degree murder in exchange for a life sentence. *State v. Jim Elley*, Appendix A-42: The defendant and two others forced an elderly woman to get into his car. They drove the woman to an isolated area, robbed her, and then strangled and beat her to death. Elley pled guilty to first degree murder in exchange for a life sentence. *State v. Gary H. Tillman*, Appendix A-58. The defendant and another man abducted an eleven year old boy as he was riding his bicycle to the neighborhood convenience store. They took him to an isolated area and the defendant sexually molested the boy, beat him repeatedly with a metal object, cut open his stomach in "field dress" style, and dismembered his body. His accomplice cut off the boy's penis and took it home with him. Tillman pled guilty to first degree murder in exchange for a life sentence.

> design to effect the death of JOEL RONNIE MEDGEBOW by stabbing him to death with a knife . . . . " (R1)

Rule 3.490, Florida Rules of Criminal Procedure states:

> If the indictment or information charges an offense which is divided into degrees, without specifying the degree, the jurors may find the defendant guilty of any degree of the offense charged: if the indictment or information charges a particular degree the jurors may find the defendant guilty of the degree charged or of a lesser degree. The court shall in all such cases charge the jury as to the degrees of the offense.

Since the offense charged (first degree murder) is divided into degrees Petitioner's jury was instructed that it might convict him of first degree murder (R473), second degree murder (R476), third degree murder (R477), or manslaughter. (R477)[97]

[97] A trial court's refusal to grant a lesser-degree instruction is reversible error. *Little v. State*, 206 So.2d 9, 20 (Fla. 1968); *Bailey v. State*, 224 So.2d 296, 199 (Fla. 1969). Instructions on the lesser included offenses may not be refused by the trial court on the ground that there is no evidence to support them; and a conviction for a lesser offense will be affirmed on appeal despite its lack of evidentiary support.

> "This Court is now definitely committed to the rule that wherever evidence is sufficient to sustain a charge of murder in the first degree, whether committed in the perpetration of certain felonies or whether from a specific premeditated design [,] a verdict convicting a defendant of a lesser degree of homicide will not be disturbed even though there is no evidence of the particular degree of the offense for which he might be convicted. We have taken the view that the responsibility of determining the degree of guilt in such cases rests peculiarly within the bosom of

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Although the respective crimes are defined in terms of elements that are theoretically distinct and mutually exclusive, the imprecision of the definitions allows the jury wide latitude to shape its guilty verdict so as to

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> the trial jury . . . [T]he Court should in all cases instruct the jury on the various degrees of the offense charged in the indictment. When the offense charged is first degree murder, whether grounded on specifically alleged premeditated design, or whether committed in the perpetration of certain felonies . . . the defendant is entitled to have the jury advised on all the degrees of unlawful homicide, including manslaughter. There should be a further instruction that it is in the province of the jury to determine the degree."

Brown v. State, 124 So.2d 481, 483 (Fla. (1960). Moreover, a defendant charged with first degree murder may, as in this case, have his jury instructed on other non-capital offenses which are not lesser degress of homicide but which are "necessarily included" in charges of first degree murder: Rule 3.510, Fla. R. Crim. Proc.

The theory upon which convictions of lesser offenses unsupported by and inconsistent with the evidence are affirmed appears to be that a defendant will not be heard to complain if the jury convicted him of a less severe offense than the crime for which he was originally charged. This "jury pardon" is a clearly recognized mechanism for the discretionary dispensation of mercy by the jury.

> "[u]nder our system of jurisprudence, the jury had the right to convict defendant of any lesser degree of the crime charged, and it made no difference whether the elements of this degree of the crime were included in the specific allegations of the indictment or information. Such a verdict convicting a defendant of a lesser degree even in the absence of proof is sometimes referred to as a 'jury pardon' of the highest degree of the crime.
>
> *Bailey v. State*, 224 So.2d 296, 297 (Fla. 1960)

avoid or permit the imposition of the death penalty[98] (such an action is made more likely when, as here, the *voir dire* examination is permeated with questions dealing with the prospective juror's willingness to recommend a death sentence.

For example, "premeditation", the distinguishing characteristic of first degree murder, has been variously defined as the "formation of a distinct purpose to take the life of another";[99] a "distinct definite purpose to take the life of another";[100] a "fully formed conscious purpose to kill";[101] or simply a "prior intention to do the act in question".[102]

[98]As Mr. Chief Justice Burger pointed out in *Furman*, "there is no assurance that sentencing patterns will change so long as juries are possessed of the power to determine the sentence or to bring in a verdict of guilt in a charge carrying a lesser sentence; juries have not been inhibited in the exercise of these powers in the past." 408 U.S. at 401.

For example in Florida a jury may convict of a non-capital attempt, Fla. R. Crim. P. 3.510; it may recognize an amorphously defined defense such as insanity, *see, e.g., Davis v. State*, 44 Fla. 32, 32 So. 822 (1902); *Perry v. State*, 142 So.2d 528 (Fla. App. 1962), or self defense, *see, e.g., Linsley v. State*, 88 Fla. 135, 101 So. 273 or mitigation such as intoxication, *see, e.g., Gardner v. State*, 28 Fla. 113, 9 So. 835 (1891); it may find that a homicide is justifiable, *see* Fla. Stat. Ann. §782.02 (1975-1976 supp.); or excusable, *See* Fla. Stat. Ann. §782.03 (1965); or it may simply refuse to convict in spite of the evidence—a not infrequent phenomenon when the death penalty is involved, see, Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1009, 1012, N. 18 (1953).

[99]*Hines v. State*, 227 So.2d 334 (Fla. App. 1969).

[100]*Polk v. State*, 179 So.2d 236 (Fla. App. 1965).

[101]*Weaver v. State*, 220 So.2d 53 (Fla. App. 1969).

[102]*Lowe v. State*, 105 So. 829 (Fla. 1925).

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For the second degree murder it is not necessary to show "premeditation" but the State must prove a "depraved mind regardless of human life."[103]

> "[d]epravity of mind is an inherent deficiency of moral sense and rectitude. . . . It is the equivalent of the statutory phrase 'depravity of heart' which has been defined to be the highest grade of malice. . . .
>
> It is obvious. . .that the phrase "evincing a deaved mind regardless of human life,' as used in the statute. . . denouncing murder in the second degree, was not used in the legal or technical sense of the word 'malice' in the popular or commonly understood sense of ill will, hatred, spite, and evil intent. It is the malice of the evil motive which that statute makes an ingredient of the crime of murder in the second degree."

Ramsey v. State, 114 Fla. 766, 154 So. 855, 856 (1934).[104] Perhaps the average juror would distinguish

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> "Premeditation may be inferred from evidence as to the nature of the weapon used, the manner in which the murder was committed and the nature and manner of the wounds inflicted."

Hernandez v. State, 273 So.2d 130, 133 (Fla. App. 1973). *See also Larry v. State*, 104 So.2d 352, 354 (Fla. 1958); *Rhodes v. State*, 104 Fla. 520, 140 So. 309, 310 (1932).

[103] Fla. Stat. Ann. §782.04(2) (1975-1976 Supp.)

[104] This case presents an illustration of the difficulty in distinguishing second degree murder from manslaughter since under the facts of the case the killing could have been either second degree murder, manslaughter, or self-defense, depending upon the interpretation given the facts. *See also Huntly v. State*, 66 So.2d 504, 507 (Fla. 1953); *Luke v. State*, 204 So.2d 359,

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first degree murder from second degree murder by looking to see whether the act in question evidence "a fully formed conscious intent to kill" or merely a "'depravity of heart' which has been defined as the highest grade of malice." The distinction becomes tenuous, however, when as in Petitioner's case, the issue of felony murder is introduced.[105]

First degree murder is defined as premeditated murder:

> ". . . *or when committed by a person engaged in the perpetration of*, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen years when such drug is proven to be the proximate cause of the death of the user. . ."

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362 (Fla. App. 1967); *Darty v. State*, 161 So.2d 864, 873 (Fla. App. 1964); *Smith v. State*, 282 So.2d 179, 189 (Fla. App. 1973); *Bega v. State*, 100 So.2d 455, 457 (Fla App. 1958). The crime of third degree murder in Florida is not, in terms of its elements, an intermediate offense between manslaughter and second degree murder. Third degree murder is instead a felony murder committed "without any design to effect death" in which the predicate felony is not arson, rape, robbery, burglary, kidnapping, aircraft piracy, or "the unlawful throwing, placing or discharging of a destructive device of bomb." Fla. Stat. Ann. §782.04(3) (1974-2975 supp.). *See Johnson v. State*, 91 So.2d 185, 187 (Fla. 1956); *Grimes v. State*, 64 So.2d 920, 921 (Fla. 1953); *Tilman v. State*, 81 Fla. 558, 88 So. 377, 378 (1921).

[105] A conviction for first degree murder under a felony murder theory can stand even when an indictment is returned charging

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Fla. Stat. Ann., §782.04(1)(a) (1973). (emphasis added).[106]

Second degree murder is an imminently dangerous act evincing a depraved mind regardless of human life:

(footnote continued from preceding page)

premeditated murder, *Larry v. State*, 104 So.2d 352 (Fla. 1958); *Killen v. State*, 92 So.2d 285 (Fla. 1957); *Everett v. State*, *97 So.2d 241 (Fla. 1957)*.

[106]The special session of the 1972 legislature which passed this statute added the language "by a person engaged in" to the felony murder portion of the first degree murder statute. The old statute read:

> (1) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or in the attempt to perpetrate any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in §775.082.

The 1973 statute was slightly modified in the 1974 session of the Florida legislature. It now reads:

> 782.04 Murder.–
> (1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed, or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person 18 years of age or older when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in chapter 775.

> "*. . . or when committed in the perpetration of*, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb. . ."
>
> Fla. Stat. Ann. §782.04(2)(1973) (emphasis added).[107]

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[107]Prior to the passage of this statute in the special session of the 1972 Florida legislature, the felony murder was applicable only to first degree murder. The old second degree murder. The old second degree murder statute read:

> (2) When perpetrated by any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, it shall be murder in the second degree and shall constitute a felony of the first degree, punishable as provided in §775.082, §775.083, or §775.084. Fla. Stat. Ann., §782.04(2) (1971).

The 1973 version of the statute was significantly modified in the 1974 session of the Florida legislature. It now reads:

> (2) The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a deparved mind regardless of human life, although without premeditated design to effect the death of any particular individual, shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment for a terms of years not exceeding life or as provided in chapter 775.
>
> (3) When a person is killed in the perpetration of, or in the attempt to perpetrate, any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony shall be guilty of murder in the second degree, which constitutes a felony of the first degree punishable by imprisonment for a term of years not exceeding life or as provided in chapter 775.

In *State v. Dixon, supra,* it was argued that the distinction between the two sections is illusory for the reason that the activity proscribed in first degree is also proscribed in second degree and, therefore, that one charged and convicted of one of the crimes could interchangeably be charged and convicted of the other.[108] This argument was dismissed by the majority, however:

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[108] The problem of felony murder is compounded even more by the homicide statute, Fla. Laws 1973, Ch. 72-724 §3 amending Fla. Stat. §78204 (1971). Section 3 (§782.04(2)(a)), which defines first degree murder, and §3 (§782.04(2)), which defines second degree murder, set forth a proscription against felony murder in virtually identical terms, so that both crimes encompass, and therefore proscribe, the exact same [sic] activity. Additional confusion is created by the fact that Fla. Laws 1973, ch. 72-274, §3 amending Fla. Stat. §782.04 (1971), provides: "The unlawful killing of a human being . . . when committed by a person engaged in the perpetration of or in the attempt to perpetrate any . . . unlawful throwing, placing or discharging of a destructive device or bomb . . . shall constitute a capital felony." That same activity is also an aggravating circumstance to be weighed by the sentencer when determining whether the death penalty should be inflicted on the capital offender. Florida Capital Punishment Act. §9 (§921.141(6)(d)). Furthermore, Fla. Laws 1973, ch. 72-724, §6(1), amending Fla. Stat. §790.161 (1971), provides that a person convicted of the same activity shall be guilty of a life felony, a capital felony or an aggravated capital felony, and each classification carries a different sentence. See Fla. Laws 1973, ch. 72-724. §§1-2 amending Fla. Stat. §§775.081(1), 775.082 (1974).

Note, *Florida's Legislatuve and Judicial Responses to Furman v. Georgia: An Analysis and Criticism,* 2 FLA. St. L.Rev. 108, 141 N. 181 (1974).

> ". . . the statute does establish two separate and easily distinguishable degrees of crime, depending upon the presence of the defendant as a principal in the first or second degree." *Id.*, 283 So.2d at 11.[109]

To the contrary, in his dissent in *Dixon,* Justice Boyd found that:

> ". . . the statute is inherently defective in that the distinctions between first and second degree murder are so ambiguous as to make it impossible for grand juries, petit juries, and judges to distinguish the difference. As written, the effect of these statutory provisions is that one who illegally causes the death on another while committing certain other felonies may be guilty of first degree murder, while in another trial, one who causes death to another under exactly the same circumstances may be guilty of second degree murder." *Dixon v. State* at 26, 27. (Footnote omitted).[110]

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[109] The Dixon Court surmised that the "obvious intention" of the Florida legislature in enacting the present murder statute was to "resurrect the distinction between principals in the first or second degree on the one hand and accessories before the fact on the other." (*State v. Dixon, supra,* 283 So.2d at 11) which the legislature had abolished in 1957. *See* Fla. Stat. Ann. §776.011 (1973). However, the Florida legislature subsequently amended the elements of second degree felony-murder so that the crime occurs when a person is killed in the perpetration of the enumerated felonies "by a person other than the person engaged in the perpetration of or in the attempt to perpetrate" the felonies. Florida Laws 1974, c.74-383, §14. *See* note 111, *supra.* The legislature thereby rejected the Florida Supreme Court's theory of principals and addresed itself to felony-murder situations involving death caused by a police officer, victim, or bystander reacting to the underlying felony.

[110] In *Alvord v. State,* 322 So.2d 533 (Fla. 1975), Mr. Justice

(continued)

The explanation offered by the majority in *Dixon*, that the difference between first and second degree felony murder is the same as the difference between a principal in the first or second degree to a crime, is subject to question. If the legislature had meant to distinguish between principals in the first and second degree, they should have made their intent pellucidly clear within the statute because another Florida statute has eliminated the common law difference between principals in the first degree, principals in the second degree, and accessories before the fact.[111] On its face

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England, in a separate opinion concurring in part and dissenting in part stated:

> Defendant has challenged the applicable statute on the ground that the statutory distinction between first and second degree murder is unconstitutionally vague. I share Justice Boyd's doubts that any juror of common intelligence or most judges, can comprehend the distinction. See State v. Dixon, 283, So.2d 1, 16-27 (Fla. 1973) (Boyd, J., dissenting). The statute has recently been held constitutional by a majority of this Court, however, in Dixon and in Alford v. State, 307 So.2d 433 (Fla. 1975). I do not perceive any legal duties to include a refusal to follow fundamental jurisprodential concepts such as stare decisis ('let the decision stand') and judicial restraint. In the absence of intervening events of compelling legal significance, and none are presented with respect to the verbal vagueness between first and second degree murder, the Court should not overturn contemporaneous case merely because there have been personnel changes in the Court.

Mr. Justice England was appointed to the Florida Supreme Court after the decision in *State v. Dixon, supra*, at 541 N.I.

[111] Fla. State Ann. §776.01 (1975-1976 Supp.)

The Statutes in effect at the time of the *Dixon* decision and

(continued)

the statue does not clearly make that distinction.[112]

Although some state legislatures have in the past

(footnote continued from preceding page)

of Petitioner's trial were:

> 776.01 Principal in first degree.—Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, is a principal in the first degree and may be charged, convicted and punished as such, whether he is or is not actually or constructively present at the commission of such offenses.
>
> 776.03 Accessory after the fact.—Whoever, not standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister, by consanguinity or affinity to the offender, maintains or assists the principal or accessory before the fact, or gives the offender any other aid, knowing that he has committed a felony or been accessory thereto before the fact, with intent that he shall avoid or escape detection, arrest, trial or punishment, shall be deemed an accessory after the fact, and shall be guilty of a felony of the third degree, punishable as provided in §775.082, §775.084 Florida Statutes (1971).

The 1974 Florida legislature slightly modified the statute as follows:

> *777.011 Principal in first degree.—Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he is or is not actually or constructively present at the commission of such offense.

The intent of the statute is still the same. There is no difference in Florida between a principal in first degree, a principal in the second degree, and an accessory before the fact: they are all considered a principal in the first degree.

[112] A state court's construction of a statute can restrict its

(continued)

attempted to make a distinction between the principal in the first degree and the other co-defendants by use of the language "a person engaged in the commission of, or in an attempt to commit" a felony, the courts have refused to follow this distinction; the situations and the words are not that clear. *E.g., People v. Giro*, 197 N.Y. 152, 157-58, 90 N.E. 432 (1910). Being "engaged" in the commission of a felony has been read the same as "perpetrating" that felony. The federal courts have long held that all of the co-defendants in a felony are "engaged" in that felony under general common law principles. *United States v. Boyd*, 45 F. 851 (W.D. Ark. 1890), *rev'd on other grounds*, 142 U.S. 450 (1892); *cf. Stein v. New York*, 346 U.S. 156 (1953).

Concerning the degree of certainty and clarity required in criminal statutes this court in *Winters v. New York*, 333 U.S. 507 (1948) said that:

> . . .The standard of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime "must be defined with appropriate definiteness." *Cantwell v. Connecticut*, 310 U.S. 296; *Pierce v. United States*, 314 U.S. 306, 311. There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness

(footnote continued from preceding page)

facial vagueness sufficiently to render it constitutional. *See, e.g., Wainwright v. Stone*, 414 U.S. 21 (1973). Nonetheless, a state court's effort to save a facially vague statute is reviewable, and if the construction fails to refine or narrow ambiguous language, the construction is inadequate. *See, Lewis v. New Orleans*, 415 U.S. 130 (1974); *Winter v. New York*, 333 U.S. 507 (1948).

> may be from uncertainty in regard to persons within the scope of the act, *Lanzetta v. New Jersey*, 306 U.S. 451, or in regard to the applicable tests to ascertain guilt.[113] 333 U.S. at 515, 516.

The issue is whether men of common intelligence would understand the difference between the phrase ". . . when committed by a person engaged in the perpetration of . . . (the listed felonies)" [first degree murder] and the phrase ". . . when committed in the perpetration of . . . (the listed felonies)" [second degree murder]. Petitioner suggests that there is little, if any difference between the two phrases. The person, in first degree murder who is "engaged," is "engaged" in the felony which unintentionally causes murder;[114] this is exactly the same as the person in second degree murder who is "committing" the felony which causes the unintentional murder. A person who is engaged in a crime obviously is committing an act during the commission of that crime; conversely, during the commission of a criminal act everyone, under the consolidation of principals statute,[115] is engaged in doing that act.

Webster's New Collegiate Dictionary[116] defines "engage," "commit" and "perpetrate" as follows:

[113] *See also, Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Watson v. Stone*, 148 Fla. 516, 518-19, 4 So.2d 700, 701 1 (1941).

[114] A felony murder is an unintentional murder, otherwise the homicide is within the premeditated portion of the statute. *See People v. Washington*, 62 Cal.2d 777, 781, 402 P.2d 130, 133, 44 Cal.Reptr. 442, 445 (1965); *Commonwealth v. Balliro*, 349, Mass. 505, 512, 209 N.E.2d 308, 312 (1965); *Commonwealth v. Kelly*, 333 Pa. 280, 386-88, 4 A.2d 805, 808 (1939); *Cf. Leavine v. State*, 109 Fla. 447, 147 So. 897 (1933).

[115] *See:* Note 111 *infra*.

[116] Webster's New Collegiate Dictionary (1975).

engage – being actively involved in or committed. . .

commit – to carry into action deliberately . . . to perpetrate

perpetrate – to bring about or carry out: commit.

The plain meaning of the words show that there is no clear distinction between the phrase ". . . when committed by a person engaged in the perpetration of . . ." and the phrase ". . . when committed in the perpetration of . . ." Yet those phrases purport to delineate the difference between a capital crime (first degree murder) and a non-capital crime (second degree murder).

The same factual situation that will support a charge of second degree felony murder will also support a charge of first degree murder.[117] There are no definite characteristics or essential elements of first degree felony murder which are not also characteristic and essential to second degree felony murder. The statute provides no guidelines to be followed by either the state attorney or the grand jury in their determination whether to charge the capital offense. Nor does it provide the petit jury with even a hint of what facts distinguish second degree felony murder from first degree felony murder. The statute thus "impermissibly delegates basic policy matters to police-

[117] For example, assume two men decided to rape a female. One man held her while the other attempted to sexually assault her. During the struggle she fell, hit her head on a rock, and died. Was her murder caused by ". . . a person engaged in the perpetration of . . . rape" and, therefore, first degree murder? (Or was her murder ". . . committed during the perpetration of . . . rape" and, therefore, second degree murder?

Assume two men decided to burn a building. One poured gasoline on the building and the other lit the match. Unbeknown to either perpetrator, a man was inside the building and died as a result of the fire. Is it reasonable to say that the death resulted while the arsonists were ". . . engaged in the perpetration of . . . arson"? Is it now also reasonable to conclude that the

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men, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. Rockford*, 108-109 (1972).

3. Executive Clemency

The Governor of Florida, with the "approval of three members of the cabinet:, may be executive order commute a death sentence to a sentence of life imprisonment.[118] Clemency in Florida is considered "an act of grace proceeding from the power entrusted with the execution of the laws."[119] The Governor initially has sole discretion to determine whether a case merits consideration for executive clemency.[120] Although the Governor must report his grants of clemency to the legislature,[121] there are no standards whatsoever for the exercise of the commutation power after the Governor has decided to review a case. Thus, the reduction of a legally authorized

(footnote continued from preceding page)

murder was ". . . committed during the perpetration of . . . arson"?

In these situations there is no reasonable and meaningful distinction between first and second degree felony murder.

[118] Fla. Const., Art. IV. §8(a) (1968). If a capital prisoner's death sentence is communted to life, he must serve a minimum of twenty five years before becoming eligible for parole. *See* Fla. Stat. Ann. §775.082(1) (1975-1976 Supp.).

[119] Rules of Executive Clemency of Florida, Rule 1 (1975).

[120] *Id.*, Rule 4.

[121] Fla. Stat. Ann. §940.01 (1973).

sentence, after it has left the hands of the judiciary,[122] is committed to the unfettered discretion of the executive branch. *Davis v. State*, 123 So.2d 703, 711 (Fla. 1960); *Johnson v. State*, 61 So.2d 179 (Fla. 1952); *La Barbara v. State*, 63 So.2d 654, 655 (Fla. 1953); *Sawyer v. State*, 148 Fla. 542, 4 So.2d 173 (1941); *Chavigny v. State*, 112 So.2d 910, 915 (Fla. App. 1959).

The Florida Supreme Court has recognized that the executive has "broad and wide discretion in . . . commuting punishments." *Ex parte White*, 161 Fla. 85, 178 So. 876, 880 (1938). Indeed, in that case the Court held unconstitutional a statute that required the Governor and his cabinet (who constituted the Board of Pardons under the 1885 Constitution) to afford clemency any time the Court affirmed a death sentence by an equally divided court. *Id.*

One study of clemency in Florida capital cases between 1960 and 1962 revealed nine executions and three commutations of death sentences of life imprisonment during this period.[123] There appears no reason to assume that the 33% clemency rate is typical or will

[122] *See e.g.*, Fla. R. Crim. Proc. 3.800 (1975).

[123] Note, *Executive Clemency in Capital Cases*, 39 N.Y.U.L. Rev. 136, 191 (1964).

decrease under the new Florida capital punishment legislation.[124] Quite probably a significant, albeit irrationally selected, group of capital defendants will continue to be spared through the exercise of executive clemency.[125]

[124] Reubin Askew, who has been Governor of Florida since 1971, stated during the 1972 hearings on the proposed death penalty legislation that he continued to have "mixed feelings as to the necessity, the rightness, and even the legality of capital punishment in any form." FLA.HR.JOUR., Spec. Sess. 6 (1972). Thus, it is likely that Askew will use his persuasive position as Governor to prevent execution of any death sentences during his term. However, whenever a different governor takes office, the unreviewable granting or denying of commutations will proceed according to different standards.

[125] Another way in which the Governor may avoid or permit the imposition of a death sentence, quite separate from granting clemency, is provided by Fla. Stat. Ann. §922.07 (1973). If the Governor is informed that a condemned defendant "may be insane, he shall stay execution of the sentence and appoint a commission of three psychiatrists to examine the convicted person." §922.07(1). After receiving the commission's report, the Governor may determine "that the convicted person has the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him", §922.07(a) and issue a death warrant, or he may determine that the convicted person lacks the mental capacity, §922.07(3), and issue an order committing him to the state hospital for the insane. *See Ex Parte Chesser*, 93 Fla. 291, 111 So. 720 (1927); *Hysler v. State*, 135

(continued)

III

THE DEATH PENALTY IS AN EXCESSIVELY CRUEL PUNISHMENT THAT IS ARBITRARILY AND IRRATIONALLY APPLIED, THAT IS INCONSISTENT WITH CONTEMPORARY STANDARDS OF DECENCY, AND THAT NO LONGER SERVES ANY PENAL PURPOSE MORE EFFECTIVELY THAN LESS EXTREME PUNISHMENTS.

Petitioner's sentence of death pursuant to the new Florida legislaton is inconsistent with contemporary standards of decency, and, thus, inherently violates the essential guarantees of the Eighth and Fourteenth Amendments.

The interrelated prevailing opinions of this Court in *Furman* reviewed the history of this country's use of the punishment of death and concluded that, although the extreme penalty was then authorized by law in forty-one American States (and by the federal government and the District of Columbia), it was in fact so rarely and so arbitrarily inflicted under discretionary sentencing procedures that it constituted a cruel and unusual punishment. This conclusion was reached because of the occasional and virtually random extinction of human life was a cruelty compounded by inequity, and becasue the very randomness and rarity of the punishment belied any claim that it fulfilled an accepted or acceptable penal purpose.

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Fla. 563, 187 So. 261 (1939). This determination is committed entirely to the discretion of the Governor, and no provision is made for any participation by the condemned defendant (except for the representation by counsel during the psychiatric examination) or for judicial review of the Governor's decision. Since §922.07(4) provides that when a defendant "has been restored to sanity", he may be executed, the motivation of any "insane" condemned man to regain mental health appears highly questionable. Some might be sane enough to feign insanity and thus postpone electrocution. Others might be crazy enough to cure themselves into oblivion. The outcome in any particular case will, of course, be ultimately determined by the discretionary decision of the Governor.

In Part II of this brief, we have demonstrated that the use of the death penalty remains arbitrary, random and wanton under Florida's post-*Furman*, discretionary capital sentencing statute because that statute provides numerous mechanisms which express and implement the unwillingness of prosecutors, juries, judges, Florida Supreme Court justice and the Governor to accept a general, uniform and even-handed application of the death penalty. These selective mechanisms and their use continue to be the means by which a punishment incapable of general or substantial application is reserved for imposition on a powerless and anonymous few. The Florida procedure continues to violate the principles applicable under the Cruel and Unusual Punishments Clause of the Eighth Amendment.

The punishment of death is an unusually severe and degrading punishment that is inflicted arbitrarily, that has been virtually totally rejected by contemporary society as a denial of human dignity, and that serves no penal purpose more effectively than the less severe punishment of life imprisonment. *Furman v. Georgia, supra*, 408 U.S. at 257-306 (concurring opinion of Mr. Justice Brennan); *Id.*, at 314-374 (concurring opinion of Mr. Justice Marshall). When measured by contemporary

standards of human decency, the punishment of death "stands condemned as fatally offensive to human dignity" under the Eighth Amendment, *Furman v. Georgia, supra,* 408 U.S. at 305 (concurring opinion of Mr. Justice Brennan), and the reasons therefore have been discussed at length in the Brief of Petitioner, *Fowler v. North Carolina,* No. 73-7031, at 102-139. Thus, the Petitioner will not here burden the Court with a recapitulation of this discussion and documentation, and he respectfully directs the Court's attention to the cited pages of the Brief of Petitioner in the *Fowler* case.

The Petitioner in the present case, also submits that additional considerations[126] arising from the unique nature of the punishment of death require a uniquely stringent standard of judicial review under "the evolving standards of decency that mark the progress of a

[126] *First,* the basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Trop v. Dulles,* 356 U.S. 86, 100 (1958). *Second,* "the death penalty bears an awesome and irrevocable finality incomparable with other punishment." *Third,* "any balancing process which sets out to weigh the penalty of death in the pans of the Eighth Amendment must begin with the proposition that capital punishment is self-evidently cruel within every meaning of that word which is civilized, Twentieth Century society can accept." *Fourth,* "the compatibility of the death penalty with Eighth Amendment values is called into question by its *de jure* or *de facto* abandonment among civilized nations." *Fifth,* "long-standing traditions defining the judicial rule in capital cases recognize the need for close scrutiny of the punishment of death." *Finally,* "in suggesting that sort of scrutiny, we ask no more of the Court than society itself demands." Brief of Petitioner, *Fowler v. North Carolina,* No. 73-7031, at 107-120 (footnotes omitted).

maturing society." *Trop v. Dulles,* 356 U.S. 86, 101 (1958). We join Petitioner Fowler in his position that:

> "Such [a stringent] examiniation requires that the Court determine whether the manifest cruelty of taking human life is or is not "justified by the social ends it [is]. . .deemed to serve." Because of the unique character of the death penalty, those justifications must be real and substantial, and they must conform to the fashion in which the penalty is applied in fact. If less drastic means for achieving the same basic purpose are available, the State must use them rather than indulge in the "pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. This much is implied in "the duty of [the]. . .Court to determine whether the action [of killing people] bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification, or whether, conversely, the punishment of death is excessive and therefore unconstitutional."

Brief of Petitioner, *Fowler v. North Carolina,* No 73-7031, at 120-121 (footnotes omitted). We concur that it "must be demonstrated that the uniquely harsh punishment of death is better fitted to the effectuation of the permissible purposes of the criminal law than other kinds of available criminal penalties, *Id.*, at 122:

> Reluctant, unpredictable and spotty application of the death penalty deprives it of the least capacity to server its supposed penal functions. As a deterrent, it is wholly incredible; as a disabler, it is as useless and fortuitous as it is unnecessary; as an instrument of retribution, it is inadequate, haphazard, and unjust.
>
> The few men whom it kills die for no reason; they are executed "in the name of a theory in which

> the executioners do not believe." Distaste for the penalty grows, and fewer men are killed as society "watch[es] without impatience its gradual disappearance."

Id., at 139 (footnotes omitted).

CONCLUSION

Petitioner was sentenced to die pursuant to Florida Statute 921.141. The imposition and carrying out of the death penalty under such a statute is violative of the provisions of the Eighth and Fourteenth Amendments to the United States Constitution.

The judgment of the Florida Supreme Court affirming Petitioner's sentence of death should be reversed.

Respectfully submitted,

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NOTE TO APPENDIX

APPENDIX A. This compilation of cases was originally submitted to the Florida Supreme Court on July 30, 1975 as an Appendix to the Brief of Appellant in the case of *George Thomas Vasil v. State of Florida*, Fla. Sup. Ct. No. 46,654 (decision pending).

INDEX TO APPENDIX A

DEFENDANTS:

Name: GARDNER, DANIEL WILBUR
Age: 39 years
Race: White
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at Florida Supreme Court

TRIAL PROCEEDINGS:

Circuit Court, Citrus County, File #

JURY RECOMMENDATION:

Life

SENTENCE OF COURT:

Death; Judgment entered January 30, 1974.

APPELLATE PROCEEDING:

Supreme Court, Case No. 45106

SUMMARY OF THE CASE:

GARDNER and his wife got into an argument at their trailer at about midnight on June 29, 1973, regarding the whereabouts of their four children. Both had been drinking throughout the day, GARDNER particularly heavily and on an empty stomach. When his wife refused to reveal the whereabouts of the children, GARDNER became enraged and began to beat her. Noises were heard throughout the night by GARDNER'S mother-in-law, who lived in an adjoining trailer, but neither she nor her boyfriend investigated. GARDNER states that he tried to waken his wife the following morning, could not do so, and got in touch with his mother-in-law next door, who finally called the police. The victim had bruises, contusions and cuts on her legs and around her pubic area and bled profusely from her vagina and liver. The Coroner's Report stated that the cause of death was loss of blood.

A plea of not guilty was entered. Following trial, the jury returned a verdict of guilty and recommended life imprisonment. The court made a separate finding of fact, overruled the jury, and sentenced the Defendant to death.

COMMENT:

The Court apparently considered this brutal beating death to be intentional and particularly heinous, atrocious and cruel. The Court found no mitigating circumstances, even the fact that the Defendant had consumed and excessive amount of alcohol.

DEFENDANTS:

Name: MC CASKILL, JAMES
WILLIAMS, OTIS TERRY
Age: both 23 years
Race: Black
Crime: First Degree Murder

SOURCE OF INFORMATION

Record reviewed at Florida Supreme Court

TRIAL PROCEEDINGS:

Circuit Court, Orange County

JURY RECOMMENDATION:

Life for both Defendants

SENTENCE OF COURT:

Death for both Defendants
Judgments entered on December 6, 1973.

APPELLATE PROCEEDINGS:

Supreme Court, Case Numbers: MC CASKILL-45009; WILLIAMS-45010

SUMMARY OF THE CASE:

The incident occurred at an ABC Package Liquor Store

in Orange County, on August 29, 1973 at about 10 p.m. Three men entered the store, masked and armed, and proceeded to rob the patrons. During the course of the robbery, two men were shot, and a third was killed as he pursued the three men out into the parking lot. There was a question at the trial of the identity of the gunmen because they are masked. State witnesses, customers and employees of the store at tht eime of the robbery, identified two of the gunmen as the co-defendants. It was also uncertain as to who did the actual shooting, although one witness did identify WILLIAMS as the assailant.

Pleas of not guilty were entered. MC CASKILL and WILLIAMS were tried together. The jury returned a verdict of guilty and recommended life imprisonment for MC CASKILL by a vote of 11 to 1 and for WILLIAMS by a vote of 7 to 5. The Court overruled the jury and sentenced MC CASKILL and WILLIAMS to death.

In its separate findings of facts regarding MC CASKILL and WILLIAMS, the Court concluded that they had just committed and were fleeing a robbery, but they knowingly created a great risk to many persons, that the capital felony was committed for pecuniary gain, and that the crime was especially heinous, atrocious and cruel. In addition, WILLIAMS had a prior criminal history, including convictions for auto theft and breaking and entering. The Court noted MC CASKILL'S lack of prior criminal record and considered the age of both men as a mitigating factor, but concluded that men of 23 years of age, should exercise sound judgment.

COMMENT:

This case might be contrasted to that of PUGH and TROWELL, where life sentences were given to two defendants because the Judge said that it was not who proved who fired the shots, so that no death penalty will be given for *either*.

DEFENDANT:

Name: OWENS, HOUSTON, JR.
Age: 21 years
Race: Black
Crime: Rape of 9 year old child

SOURCE OF INFORMATION:

Record reviewed at District Court of Appeal.

TRIAL PROCEEDINGS:

Circuit Court, Escambia County, Case No. 73-S75.

JURY RECOMMENDATION:

Life

SENTENCE OF COURT:

Life; Judgment entered August 22, 1973.

APPELLATE PROCEEDINGS:

District Court of Appeal, First District, Case No. U-177

Affirmed in an Opinion by Justice McCord, September 10, 1974.
Supreme Court: Case No.

OWENS appealed to the Supreme Court in a *pro se* proceeding.

SUMMARY OF THE CASE:

OWENS was indicted for the rape of a 9 year old white child in Escambia County on February 12, 1973. The victim was sent to the grocery store on an errand for her mother, at about 4 p.m. one afternoon. She returned home about 4:20 p.m. with her clothes torn and her body covered with dirt and scratches. She said that she had been grabbed from her bicycle on her way home, dragged into the woods and raped by OWENS whom she identified from clothing and an earring he had been wearing. Evidence of actual vaginal penetration was circumstantial as the child was bleeding so profusely that experts testified that any semen that might have been found had been washed away in the blood flow. The child was not beaten or otherwise harmed.

OWENS plead not guilty and had several witnesses to testify that he had been with them during the entire time in question. The jury found him guilty of rape of a child. At the sentencing hearing, the defense stipulated that if the jury recommended death, the Judge would order a psychiatric examination and the Judge said if the jury recommended death, he would order a Pre-Sentence Investigation. The only aggravating

circumstance was a prior conviction for robbery. The defense raised no mitigating circumstances, observing that before the verdict was returned, the jury had asked if they would be able to recommend mercy if they found OWENS guilty. The jury did in fact recommend mercy.

Athe pronouncement of sentence, the Judge sentenced OWENS to life in prison rather than death, based on the recommendation of the jury and also on his oral finding of fact that OWENS was only 21 years old, that he could possibly be paroled and become a productive citizen, and the fact that he did not attempt to take any lives in the commission of the crime.

The case was appealed to the First District Court of Appeal, one point of appeal being the constitutionality of the 15-year/without parole life sentence. The lower court decision was affirmed by the DCA in an opinion written by Justice McCord ruling that statutory provision constitutional. OWENS is appealing his case to the Florida Supreme Court *pro se*. The Supreme Court affirmed.

DEFENDANT:

Name: DEAN, DONALD QUINCEY
Age: 34 years
Race: White
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at First District Court of Appeal.

TRIAL PROCEEDINGS:

Circuit Court, Duval County, Case No. 73-3913-CF

JURY RECOMMENDATION:

Life (Unanimous)

SENTENCE OF COURT:

Life; Judgment entered on February 1, 1974.

APPELLATE PROCEEDINGS:

District Court of Appeal, First District, Case No. V-165.

SUMMARY OF THE CASE:

DEAN hired co-defendant CLIFTON WAYNE ROWELL to kill DEAN'S bookkeeper who allegedly knew too much about DEAN'S dealings in drugs and stolen goods. The record is replete with descriptions of lurid sexual affairs and criminal activity, appellant's brief in the First District Court of Appeal describing it as "degrading" and "revolting" conduct, a "sordid" account of the lives and lifestyles of people who respect neither themselves, their families, friends, or the law.

The record indicates that ROWELL was the state's main witness. He testified that DEAN had hired him to kill the intended victim and that on several previous occasions DEAN had asked him to harrass her by doing such things as slashing her car tires, planting drugs in

her car, shooting at her trailer and securing false affidavits to have her committed to Macclenny. All of this ROWELL said he did for $50.00. While the woman and her husband and child were asleep in their trailer, ROWELL fired several shots into the trailer. It was the intended victim's husband who was actually killed in the barrage.

The record indicates that prosecution and defense stipulated that the aggravating circumstances were that ROWELL knowingly created great risk of death to many persons by shooting indiscriminately into the trailer and that the murder for hire was especially henious, atrocious and cruel. They also stipulated that the only mitigating circumstances was that DEAN had no prior criminal record. The defense also testified that DEAN had been a police informant. A pre-sentence investigation was ordered at the request of the defense. Transcript of the sentencing hearing is not included in the record on appeal. The jury advised a life sentence.

A jury trial was held, DEAN found guilty of first degree murder.

The Judge did not make a separate finding of fact when he sentenced DEAN to life in prison.

DEAN was portrayed at the trial as a generally "bad guy" who had been involved in extensive drug dealing and receiving stolen goods in Duval County, extramarital affairs with various women including the intended victim and the wife of ROWELL and other extralegal activities.

DEFENDANT:

Name: REGISTER, JOHNNY E.
Age: 44
Race: White
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at First District Court of Appeal

TRIAL PROCEEDINGS:

Circuit Court, Hamilton County, Case No. 74-18

JURY RECOMMENDATION:

Life

SENTENCE OF COURT:

Life, Judgment Entered on May 14, 1974.

APPELLATE PROCEEDINGS:

District Court of Appeal, First District, Case No. W-104 Affirmed in *per curiam* decision without opinion, November 21, 1974.

SUMMARY OF THE CASE:

REGISTER, age 44, white, was indicted for the shooting murder of EDDIE LEE MILLER, age 75,

white, in REGISTER'S front yard. REGISTER and MILLER were friends and MILLER was, in fact, staying with REGISTER and his parents at the REGISTERS' home. On the day of the murder, both men had been drinking. REGISTER had some sample ballots for an upcoming election which MILLER refused to help distribute. MILLER was known to wear a holster and to carry two guns in his car. During the discussion, MILLER said that he was going to get his gun, and he went outside. REGISTER went to his bedroom, got his gun from under the bed and loaded it. He went to the front porch, saw MILLER coming back into the yard--but testified that he did not see a gun--and shot MILLER several times. The only witness to the shooting, who was passing by on the street, testified that MILLER was crouched down on his knees as REGISTER kept firing and that MILLER had no gun. After the shooting, REGISTER went back into the house and his mother went to MILLER'S assistance. MRS. REGISTER called her son to help her, and they took miller to the hospital where he died about three weeks later.

The defense pled not guilty by reason of self-defense, but the jury found REGISTER guilty of first degree murder and recommended a life sentence. At the sentencing hearing, the prosecution relied on testimony at the trial, saying that REGISTER had shot down an old man for no reason and that for that reason the crime was especially heinous, atrocious and cruel. The defense said that there were no aggravating circumstance, that REGISTER took the victim to the hospital, and that mitigating circumstances were that REGISTER

had no significant prior criminal activity except for several charges connected with drunkeness, that his drinking that day has lowered his capacity to appreciate the criminality of his doncut, and that his being a middle-aged man with no trouble before, showed that this was a spur-of-the moment drunken behavior not likely to be repeated.

In completing a form furnished them by the Court, the jury indicated that they found no aggravating circumstances, and that they considered mitigating circumstances to be that REGISTER had no significant prior criminal activity, that the crime was committed while REGISTER was under extreme mental or emotional disturbance, and that his capacity to appreciate the criminality of his conduct was impaired. The Judge made no separate finding of fact for the record.

DEFENDANT:

Name: MANNING, DAVID EARL
Age: 22 years
Race: White
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at First District Court of Appeal.

TRIAL PROCEEDINGS:

Circuit Court, Liberty County

JURY RECOMMENDATION:

Life

SENTENCE OF COURT:

Life; Judgment entered on August 7, 1973.

APPELLATE PROCEEDINGS:

District Court of Appeal, First District, Case No. U-156. Affirmed in *per curiam* decision, Janyary 8, 1974.

SUMMARY OF THE CASE:

MANNING, a 22 year old white male was indicted by a Liberty County Grand Jury for the March 11, 1973, First Degree Murder of a 60 year old white male.

After an evening at a local pool hall where MANNING had some contact with the victim, MANNING went to the victim's trailer and cut his jugular vein with a broken catsup bottle.

MANNING pled self-defense,claiming a slight scuffle had ensued and that when he shoved the victim in self-defense, the victim fell on the broken catsup bottle. MANNING contacted the police the next morning.

The jury returned a verdict of guilty and recommend a life sentence.

The Court followed the jury's recommendation without issuing a finding of fact, and sentenced the defendant to life imprisonment.

It appeared from the record that the only aggravating circumstance was that the killing was especially henious, atrocious and cruel.

It would further appear the only mitigating circumstances which existed was the defendant's age. The defense counsel also made reference to the defendant's marriage and employment.

DEFENDANT:

Name: WOOD, RICHARD L.
Age: 23 years
Race: Black
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at First District Court of Appeal.

TRIAL PROCEEDINGS:

Circuit Court, Leon County, Case No. 73-139.

JURY RECOMMENDATION:

Life

SENTENCE OF COURT:

Life; Judgment entered May 22, 1973.

APPELLATE PROCEEDINGS:

District Court of Appeal, First District, Case No. T-499

SUMMARY OF THE CASE:

WOOD, a 23-year-old black man, was indicted for first degree murder in the stabbing death of a man in Frenchtown (Tallahassee) during a bar room fight. The defense claimed self-defense. The jury found WOOD guilty of first degree murder.

At the sentencing hearing, the prosecution said the murder was especially heinous, atrocious and cruel because the victim had died slowly from multiple stab wounds in the chest, back and neck. It was termed a "malicious" killing. The defense said that mitigating circumstances included that WOOD had no significant prior criminal activity (two arrests, no convictions), that the victim had participated in the fight, that WOOD was under extreme duress, that he was mentally impaired (he had been found medically/mentally unfit for military service) and that he was only 23 years old.

The jury recommended a life sentence and the judge concurred without making a finding of fact for the record.

DEFENDANT:

Name: ELKINS, WILLIE
Age: 46 years
Race: Black
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at First District Court of Appeal.

TRIAL PROCEEDINGS:

Circuit Court, Alachua County, Case No. 73-345-CF

JURY RECOMMENDATION:

Life

SENTENCE OF COURT:

Life; Judgment entered on September 28, 1973.

APPELLATE PROCEEDINGS:

District Court of Appeal, First District, Case No. U-246.
Affirmed in *per curiam* decision.
Supreme Court, Case No. 45,757, Certiorari denied, October 11, 1974.

SUMMARY OF THE CASE:

ELKINS was indicted and convicted for the shooting murder of LEVI SMITH in Gainesville. ELKINS had gone to SMITH'S house one morning, a fight broke out between them. ELKINS testified that SMITH had asked him to perform a homosexual act and that he had refused. A third man who had been staying in the house with SMITH testified that he had separated the two and escorted ELKINS out the door. ELKINS went

to his car, took out his gun and shot SMITH on the front porch of the house. The record indicates that ELKINS may have intended to shoot the man who stopped the fight and that, in fact, ELKINS said as much to the police in a statement which the defense tried unsuccessfully to suppress.

ELKINS pled not guilty, was found guilty of first degree murder by a jury. At the sentencing hearing, the prosecution said that aggravating circumstances were (1) that by shooting his gun in a neighborhood, ELKINS had knowingly created a great risk of death to many persons, and (2) that because the victim was shot after the fight was over, sitting in his rocking chair on the porch without a weapon and without attempting to resume the fight, the crime was cold-blooded murder and especially heinous, atrocious and cruel. The defense did not raise any of the statutory mitigating circumstances, relying instead on arguments against the cruelty of the death penalty. The jury recommended a life sentence and the judge concurred.

COMMENT:

The Judge made no finding of facts for the record and he apparently discounted the prosecution's theory in support of the death penalty.

DEFENDANTS:

Names: PUGH, CARL LEE
TROMWELL, PAUL S.
Ages: Not available in record

Race: Black
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at Fourth District Court of Appeal.

TRIAL PROCEEDINGS:

Circuit Court, Palm Beach County, Case No. PUGH: 73-1275; TROWELL: 73-1204.

JURY RECOMMENDATION:

Life

SENTENCE OF COURT:

Life; Judgment entered for both on October 16, 1973.

APPELLATE PROCEEDINGS:

District Court of Appeal, Fourth District, Case No. 73-1204 for TROWELL and Case No. 73-1275 for PUGH.

SUMMARY OF THE CASE:

TROWELL and PUGH were indicted for the first degree murder of the white night manager of an ABC Liquor Store.

On March 30, 1973, the defendants staked out the local ABC Liquor Store. They pretended that their car had broken down and watched until the night manager left the premises. They then followed the victim in their car until they arrived at a stop sign. Witnesses saw the passenger get out of the car, go up to the victim's car and fire one shot. The victim's car then proceeded down the road until it finally crashed. The victim was found dead. Separate trials were held before the same Judge. PUGH admitted participating but denied firing the shot. It was never definitely established at the trial which of the two defendants actually did fire the shot. Juries found TROWELL and PUGH guilty of first degree murder and recommended life sentences. The Judge determined that aggravating circumstances were that the murder was committed during a robbery, for a pecuniary gain. In addition, both defendants had prior criminal records and PUGH was on parole for a robbery involving the use of force. Although there were aggravating circumstances and no mitigating circumstances for each defendant, the Judge followed the jury's recommendation of a life sentence because it was not established at either trial who had actually shot the victim.

The Judge ordered pre-sentence investigations and filed written findings of facts in both cases.

DEFENDANT:

Name: MERCADO, VICTOR MANUEL

Age: 20
Race: White (Puerto Rican)

SOURCE OF INFORMATION:

Record reviewed at the Fourth District Court of Appeals

TRIAL PROCEEDINGS:

Circuit Court, Palm Beach County, Case No.

JURY RECOMMENDATION:

Life

SENTENCE OF COURT:

Life; Judgment entered September 17, 1973.

APPELLATE PROCEEDINGS:

District Court of Appeal, Fourth District, Case No. 73-1098
Affirmed in *per curiam* decision.

SUMMARY OF THE CASE:

MERCADO, a 20 year old Puerto Rican male, was indicted for the murder in the first degree in the shooting death of a 17 year old Puerto Rican male.

MERCADO and the victim were both employed at the

same restaurant. On February 20th, they got into a rather heated argument about employment. On February 22, 1973, MERCADO bought bullets for his pistol. He then went to the victim's house, and waited for his return. When a car pulled in a short time later, the victim got out of the car with a bottle in his hand and MERCADO shot him.

MERCADO claimed self-defense, alleging that the victim was coming at him with the bottle with the intent to do him bodily harm. MERCADO shot the victim four times in the back. The jury returned a verdict of guilty and recommended a life sentence. After the jury's recommendation was made, the State announced that it was not seeking the death penalty.

The Judge ordered a pre-sentence investigation and submitted a written finding of fact that no agravating circumstances existed. The Judge found the mitigating circumstances that MERCADO had not significant prior criminal history.

DEFENDANT:

Name: GENTRY, JOHN LEE
Age: 28 years
Race: Black
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at the Fourth District of Appeal.

TRIAL PROCEEDINGS:

Circuit Court, Palm Beach County

JURY RECOMMENDATION:

Life

SENTENCE OF COURT:

Life; Judgment entered October 1, 1974.

APPELLATE PROCEEDINGS:

District Court of Appeal, Fourth District, Case No. 74-1345

SUMMARY OF THE CASE:

GENTRY was charged by indictment with first degree murder and assault with intent to commit murder in the second degree. On October 18, GENTRY had a domestic quarrel with his common law wife in their room in Palm Beach County. The victim ran out of their room, into an adjoining room where her mother was seated and jumped into her mother's lap, asking her to protect her from the defendant. The defendant ran into the room brandishing a large butcher knife. Also in the room was one ALEX MONTIS, who stood up and asked the defendant what he was doing, whereupon the defendant cut MONTIS on the head with the butcher knife and declared, "I'm going to kill all three of you." He then stabbed the victim twice in the chest where she sat cuddled in her mother's arms.

The jury returned a verdict of guilty of murder in the first degree.

At the sentencing hearing evidence was presented that the victim had five children that were being cared for by the defendant and herself. The jury recommended life imprisonment.

The Judge ordered a pre-sentence investigation. The defendant was returned to Court on October 1, 1974 where he was adjudged guilty and sentenced to life imprisonment. The Judge filed his detailed written findings of fact in support of his judgment, stating that with regard to F.S. §921.141, and the interpretation of the criteria as set fourth in *State v. Dixon*, 283 So.2d 1 (1973). There were no aggravating circumstances, despite the fact that

> "[I]t is indeed difficult to take the position that first degree murder from a premeditated design is not especially henious, atrocious or cruel when the defendant, after a domestic dispute, takes a butcher knife and chases the woman with whom he has lived into another apartment and plunges the knife into her chest while he threatened to kill the victim. Then he calmly walks from the apartment as if nothing had occurred." [p. 3 of findings]

The Court found the mitigating circumstance of no prior criminal activity of the defendant.

COMMENT:

(only?)

This was one of the few cases in which the justification for sentence was imposed could be determined.

DEFENDANTS:

Name: JEFFERSON, ARTHUR FILMORE
JEFFERSON, LARRY
Age: 32 years (ARTHUR JEFFERSON)
20 years (LARRY JEFFERSON)
Race: White (both)
Crime: First Degree Murder (both

SOURCE OF INFORMATION:

Record reviewed at Fourth District Court of Appeal (ARTHUR JEFFERSON)
Conference with counsel (LARRY JEFFERSON)

TRIAL PROCEEDINGS:

Circuit Court, Brevard County, Case No. 74-477 (tried together)

JURY RECOMMENDATION:

Life (for both)

SENTENCE OF COURT:

Life; Judgment entered for both on November 18, 1974.

APPELLATE PROCEEDINGS:

District Court of Appeal, Fourth District, Case No. 75-252 (ARTHUR JEFFERSON)
Case not being appealed. (LARRY JEFFERSON)

SUMMARY OF THE CASE:

ARTHUR FILMORE JEFFERSON and his brother, LARRY JEFFERSON, were tried in separate trials for the shooting death of a 29 year old white man in Brevard County.

On December 2, 1973, ARTHUR and LARRY and one other male went to the back of the Sizzlin Steak House in Brevard County apparently intending to burglarize it. The victin of this case, the night manager of the Sizzlin Steak House, was coming out the back door with a satchel with the evening receipts in it. There was approximately $8,000.00 in the satchel at this time. He was confronted in the parking lot by the three defendants; ARTHUR demanded the money. At this point, the victim threw the satchel over the wall and it was alleged that ARTHUR then fired one shot and then, after the victim began to fall backwards, fired two more shots. The victim's wife heard the commotion and the shots and got outside the back door of the Sizzlin Steak House just in time to see her husband staggering towards her. The victim was hospitalized and subsequently died on December 31, 1973. The case took some time to develop, and finally the three alleged culprits were apprehended.

ARTHUR and LARRY vehemently denied any participation in the robbery. The third defendant was granted immunity for his testimony, and it was he who said that ARTHUR fired the fatal shots. It was this third defendant's claim that he and LARRY were along but they had panicked and run after the shooting.

In both cases, the defendants were found guilty of first degree murder with recommendation of life imprisonment. The record indicates that the Judge followed the jury's recommendation of life imprisonment for ARTHUR and sentenced him to life imprisonment despite the fact that it appears that the defendant was under sentence of imprisonment, that the defendant was participating in a robbery, and that the capital felony was committed for pecuniary gain. Moreover, it appears that the defendant had an extensive criminal record with at least ten prior convictions.

Conferences with Counsel for LARRY JEFFERSON indicated that LARRY had a prior record and was under sentence of imprisonment for breaking and entering. By way of mitigation, it appeared that LARRY was an accomplice in the capital felony and that his age was a consideration in the sentence. Conference with counsel indicated that after extensive discussion and negotiation, the defendant was sentenced to life in prison and that the case would not be appealed.

DEFENDANT

Name: CALLOWAY, JESSIE WILLIE
Age: 26 years
Race: Black
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at Fourth District Court of Appeal

TRIAL PROCEEDINGS:

Circuit Court, Okeechobee County, Case No. 74-1

JURY RECOMENDATION:

Life

SENTENCE OF COURT:

Life; Judgment entered April 18, 1974.

APPELLATE PROCEEDINGS:

District Court of Appeal, Fourth District, Case No. 74-611

SUMMARY OF THE CASE:

JESSIE WILLIE CALLOWAY was indicted for the first degree murder of a five-month-old black baby in Okeechobee County.

On December 29, 1973, the defendant and the victim's mother returned home from an evening of drinking at various bars in Okeechobee. The mother testified that she and CALLOWAY had been living together under a common law set-up with her two children. When they returned home, the mother testified that the defendant grabbed the baby by the chest and, holding it down, began to beat it. She tried to intervene on the baby's behalf and at this point he was quoted as saying "are

you trying to stick up for him" and struck her once on the head knocking her against the wall. At this point he picked up the baby, raised it over his head and threw it to the concrete floor. She then ran out and the defendant caught her and together they went to a bar and summoned assistance.

The defendant contended that when he returned home he heard the baby crying and picked it up in an effort to comfort it. Then as he was tossing the baby up and down in his hands in a bouncing manner, because of his high degree of intoxication he missed the baby and it fell to the floor. It was his contention that the baby was already injured when he returned home and that was the reason it was crying. The jury returned a verdict of guilty of murder in the first degree. The jury then returned a recommendation of life imprisonment.

Immediately upon the return of the advisory verdict the Judge pronounced a sentence of life imprisonment upon the defendant without a written finding of fact. The Judge stated in the record he considered the crime especially heinous, atrocious and cruel as far as aggravating circumstances.

He also pointed out that the defendant had no prior criminal record, and his capacity to appreciate the criminality of his conduct was impared due to the high degree of intoxication, and also the defendant's age were sufficient to justify an imposition of a life sentence.

DEFENDANT:

Name: ZADNICK, RUDOLPH
Age: 35 years
Race: White
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at Fourth District Court of Appeal.

TRIAL PROCEEDINGS:

Circuit Court, Orange County, Case No. 74-1866

JURY RECOMMENDATION:

Death

SENTENCE OF COURT:

Life; Judgment entered November 27, 1974.

APPELLATE PROCEEDINGS:

District Court of Appeal, Fourth District, Case No. 74-1807

SUMMARY OF THE CASE:

ZADNICK was charged with the beating and stabbing death of a white female whose age was not determined for the record, and her five year old son.

The defendant had been living with the victim and her son for a short period of time prior to this incident. It appears that in the late evening hours of June 27, 1974 someone beat the mother and her child in the bedroom of their home with a skillet. The mother's body was found on the bed and the child's body was found next to the bed with one leg on the bed. Also found in the room was a broken skillet which apparently had been used to inflict the wounds on the heads of the victims, and a knife which was attributed to the stab wounds that were also found on the two victims.

Earlier that evening one JAMES ATKINS had been with the victim and her son and testimony followed that the defendant arrived after JAMES ATKINS left and was not seen leaving the house later in the evening. The defendant's shirt was found in the bedroom where the bodies were found with blood on it, and a D.W.I. citation in the pocket connected the case to him.

ZADNICK was found guilty of first degree murder by a jury which recommended the death sentence. The Judge, however, overruled the jury's recommendation, stating that the crime was not particularly heinous, atrocious and cruel, ZADNICK had no prior record and that ZADNICK had been drunk. ZADNICK was sentenced to two consecutive live sentences.

COMMENT:

The bludgeoning and stabbing death of a mother and young child were determined by the Judge in this cas not to be within the meaning of "heinous, atrocious and cruel". The defendant's drinking was mentioned.

DEFENDANT:

Name: LEE, DELORES, a/k/a
BROWN, DELORES
Age: 21 years
Race: Black
Crime:

SOURCE OF INFORMATION:

Record reviewed at Fourth District Court of Appeal.

TRIAL PROCEEDINGS:

Circuit Court, Orange County, Case No. 74-201

JURY RECOMMENDATION:

Life

SENTENCE OF COURT:

Life: Judgment entered May 22, 1974.

APPELLATE PROCEEDINGS:

District Court of Appeal, Fourth District, Case No. 74-847.

SUMMARY OF THE CASE:

DELORES LEE was indicted for first degree murder in the shooting death of a 49-year old white man in Orange County.

On May 28, 1973, the defendant, allegedly a prostitute, got into the victim's car under the guise of setting up a prostitution connection. She directed him to drive to a remote area and enter a vacant lot. At this time, one JACK FLORENCE arrived. FLORENCE apparently got a pistol from the victim's car and shot the victim three times: once in the head, once in the neck and once in the shoulder. FLORENCE took an undetermined amount of money and disappeared. He has not yet been apprehended.

The defendant attempted to establish at the trial that she had no prior knowledge and was not acting as a principal not as an accessory to this offense and that the crime was as big a surprise to her as it was to the victim. The state put on no evidence at the sentencing hearing and the jury recommended a life sentence. The Judge made the simple statement that the aggravating circumstances did not outweigh the mitigating circumstances, and sentenced her to life imprisonment.

COMMENT:

Apparent aggravating circumstances were that the murder was committed during a robbery and for pecuniary gain. Apparent mitigating circumstances were that defendant was an accomplice who did not actually commit the murder and that she was only 21 years old.

DEFENDANT:

Name: WARE, CHARLIE
Age: 24 years
Race: Black
Crime: First Degree Murder
Robbery

PLEA NEGOTIATIONS:

WARE pled *nolo contendere* to both counts in the Circuit Court of Orange County, Case No. 73-2157 and 73-2067 in exchange for life imprisonment.

JURY RECOMMENDATION

No jury was impaneled for advisory sentence.

SENTENCE OF THE COURT:

Life; Judgment entered January 16, 1974.

APPELLATE PROCEEDINGS:

District Court of Appeal, Fourth District, Case No. 74-95

SUMMARY OF THE CASE:

WARE, a 24 year old black male, was indicted for robbery and murder in the first degree in connection with a shooting death of a 50 year old white male service station attendant.

Apparently, two other individuals were involved. On August 22, 1973, a car with three black males pulled into a service station at the Lakeshore Lodge in Orange County. When they pulled in, the attendant was seated by the front of the establishment. At this time, WARE pulled pistol and shot the attendant where he sat. They then took $65.00 from a woman who was present at the establishment.

The Judge made no written finding of fact to support the judgment and sentence. It could be gleaned from the record that the aggravating circumstances present would have been the defendant was in the perpetration of a robbery and that it was committed for pecuniary gain. The only mitigating circumstance that can be gleaned from the record would be his age.

DEFENDANT:

Name: POWERS, MICHAEL LAWRENCE
Age: Not available from Record
Race: Black
Crime: First Degree Murder and Robbery

SOURCE OF INFORMATION:

Record Reviewed at Fourth District Court of Appeals.

TRIAL PROCEEDINGS:

Circuit Court, Seminole County, Case No. 73-389

JURY RECOMMENDATION:

Life

SENTENCE OF COURT:

Life; Judgment entered October 10, 1973.

APPELLATE PROCEEDINGS:

District Court of Appeal, Fourth District, Case No. 73-1196

SUMMARY OF THE CASE:

POWERS was indicted for the murder in the first degree and robbery in connection with the shooting death of a 50 year old white male.

The case arose in Cape Canaveral in Brevard County, but due to the pretrial publicity, was transferred to Seminole County.

On May 17, 1973, the defendant entered a Minit Mart on Cape Canaveral. He found the elderly proprietor to be the only person present. He made the proprietor move to the rear of the store and forced him to seat himself upon a box. The defendant fired three shots into the victim's head, killing him instantly.

It appears that the defendant made statements to his brother that once he got in the store he was going to kill the old man. Moreover, he made numerous statements to fellow inmates in the County Jail during the pendency of his trial that he intended to and was glad that he had shot the old man.

The jury found POWERS guilty of first degree murder, recommending a life sentence. The Judge followed the jury recommendation.

COMMENT:

This brutal premeditated killing was carried out during a robbery. No mitigating circumstances were shown in the record.

DEFENDANT:

Name: DEESE, JR., WILLIAM
Age: 23 years
Race: White
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at Fourth District Court of Appeal

TRIAL PROCEEDINGS:

Circuit Court, Palm Beach County, Case No. 73-625

JURY RECOMMENDATION:

Life

SENTENCE OF COURT:

Life; Judgment entered on January 11, 1974.

APPELLATE PROCEEDINGS:

District Court of Appeal, Fourth District, Case No. 74-70

SUMMARY OF THE CASE:

DEESE was indicted for murder in the first degree in the death of a white male in Palm Beach County. It appears that on January 29, 1973, the victim, DONALD BELCHER, followed the defendant home and made a proposition to him for homosexual relations. The defendant went with him and got into the victim's car and rode with him to a remote roadsite. It was at this remote roadsite that the victim's body was found some days later with numerous stab wounds.

The defendant, asserting that all he wanted to do was beat the man up, also presented evidence that the defendant had been drinking for ten to twelve hours and was not in complete comprehension of what he was doing.

However, the facts indicate that the victim was stabbed 22 times in the head and neck, 4 times in the heart, and there were 6 slicing type cut wounds, and 1 cut which the doctor testified was an effort to amputate the victim's genitals. From the doctor's findings, it appears that the genitals were being pulled away from the body at the time that they were cut. The defendant admitted that he wanted to beat up the man because he hated homosexuals, but did not recall the details of the killing himself.

The matter was presented to the jury on July 13, 1973 and they returned a verdict of guilty of murder in the first degree with recommendation of life imprisonment.

DEESE was adjudged guilty of the offense and sentenced to life imprisonment. The Court entered a written finding of facts in support of its sentence. It appears that extensive psychiatric testimony was presented at the trial going to the defendant's state of mind at the time of perpetration of this offense. The Court also had the benefit of a pre-sentence investigation, however, no specific aggravating and mitigating circumstances were set forth in the written findings and all that could be gleaned from the record would have been that of the defendant's age as a mitigating circumstance and that the crime was especially heinous, atrocious or cruel.

DEFENDANT:

Name: DIXON, DONALD ALLEN
Age: 27 years
Race: White
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at First District of Appeal

TRIAL PROCEEDINGS:

Circuit Court, Madison County, Case No. 74-63

JURY RECOMMENDATION:

Life

SENTENCE OF COURT:

Life; Judgment entered on June 21, 1974.

APPELLATE PROCEEDINGS:

District Court of Appeal, First District, Case No. W-219

SUMMARY OF THE CASE:

DIXON was charged with the first degree murder of his 19 year old wife during a marital argument in Madison County. DIXON said that he and his wife had struggled in the car after having marital problems and that a gun was fired several times during the struggle, one of the bullets entering his wife's brain from the back of the head and one inflicting surface wounds on DIXON. After determining that his wife was dead (about 10 p.m. on December 14, 1972), DIXON drove to Suwannee County and appeared at the County Jail at about 3 a.m. with his wife's body in the car. He admitted the shooting, saying that it had been accidental.

The jury recommended life imprisonment, the only possible aggravating circumstance being the prosecution's contention that the crime was especially heinous, atrocious and cruel. The Judge accepted the jury's recommendation without including a separate finding of fact for the record and sentenced DIXON to life imprisonment.

DEFENDANT:

Name: MC MAHON, RAYMOND
Age: 32 years
Race: White
Crime: First Degree Murder

SOURCE OF INFORMATION:

Conference with defense counsel

PLEA NEGOTIATIONS:

MC MAHON pled guilty to two counts of first degree murder and was sentenced to two concurrent life sentences in the Circuit Court of Hillsborough County, Case No.

SENTENCE OF COURT:

Life: Judgment entered

APPELLATE PROCEEDINGS:

SUMMARY OF THE CASE:

MC MAHON was indicted for the first degree murder of two young white girls, ages 5 and 13, in Tampa, Florida.

MC MAHON was driving at dusk in a residential neighborhood of Tampa and circled the block two or three times. The girls were walking with their brother on the opposite side the street, off the roadway. MC MAHON swerved his car and ran over the three,

stopped the car quickly, threw the older girl in the car, and sped off. The 5 year old died two days later. The body of the 13 year old was found 2 days later after the incident along the side of the road some distance from the scene. Her panties were off but there was no physical evidence of sexual molestation. The evidence was that she had died within 15 minutes after being hit by the car. MC MAHON turned himself in to law enforcement officers 10 days later in Baxley, Georgia. MC MAHON did not know the victims. There was evidence that he and his wife had been arguing furiously immediately before the incident.

The Court made no finding of facts concerning aggravating and mitigating circumstances.

DEFENDANT:

Name: ADAMS, JAMES
Age: Not available from record
Race:
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at Supreme Court.

TRIAL PROCEEDINGS:

Circuit Court, St. Lucie County, Case No.

JURY RECOMMENDATION:

Death

SENTENCE OF COURT:

Death; Judgment Entered on March 19, 1974.

APPELLATE PROCEEDINGS:

Supreme Court, Case No. 5,450

SUMMARY OF THE CASE:

DEFENDANT:

Name: ALVORD, GARY
Age: 26
Race: White
Crime: First Degree Murder (3 victims)

SOURCE OF INFORMATION:

Record reviewed at Supreme Court.

TRIAL PROCEEDINGS:

Circuit Court, Hillsborough County, Case No.

JURY RECOMMENDATION:

Death

SENTENCE OF COURT:

Death

APPELLATE PROCEEDINGS:

Supreme Court, Case No.

SUMMARY OF THE CASE:

ALVORD was indicted for the first degree murder of 3 white women in Tampa.

The bodies of three women were discovered in the Tampa home of ANN HERMANN, 36, one of the victims. The other victims were GEORGIA TULLY, MRS. HERMAN'S mother and LYNN HERMANN, the 18 year old daughter of MRS. HERMANN. The victims were found in separate rooms of the house strangled with a piece of cord. A vaginal test of LYNN HERMANN showed the presence of semen, although there was no evidence that the semen was the defendant's. The front door of the house had been kicked open and the condition of the house indicated that the murderer had burglarized the house.

ALVORD had been confined to mental institutions intermittently since age 13, and had recently escaped from a Michigan Mental Hospital. He was in the hospital as a result of being found not guilty of rape by reason of insanity (not a M'naughten state). ALVORD had stated a month before the slaying that he disliked ANN HERMANN and could or would choke her. There was testimony that ALVORD had some of ANN HERMAN'S jewelry in his possession after the date of the murders. A cord similar to the murder cord was found in ALVORD'S apartment, and his girlfriend testified that he told her "I had to rub out 3 people last night"–"ANN, LYNN and her mom." He had

further stated that he had gone to the house to kill them and had gotten in the house by kicking the door in.

A plea of not guilty was entered. Following trial, the jury returned a verdict of guilty and recommended the death penalty. The Court made a separate finding of fact as to the following aggravating and mitigating circumstances:

Aggravating: (A) There was a premeditated design to commit the capital felony while engaged in the commission of a burglary; (B) At the time the capital felony was committed, two other capital felonies (murder) took place; (C) The murders were especially henious, atrocious and cruel; (D) The defendant knowingly created a great risk of serious bodily harm and death to many persons.

ALVORD also had a significant criminal record.

Upon this finding of fact, the Court sentenced ALVORD to death.

Mitigating circumstances the Court found were that ALVORD was under the influence of extreme mental disturbance, and his capacity to conform his conduct to the requirements of the law was impaired.

DEFENDANT:

Name: MOORE, JACOB
Age: Not available from Record
Race: Black
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at Second District Court of Appeal

TRIAL PROCEEDINGS:

Circuit Court, Sarasota County, Case No.

JURY RECOMMENDATION:

SENTENCE OF COURT:

Life;

APPELLATE PROCEEDINGS:

District Court of Appeal, Second District, Case No. 74-496

SUMMARY OF THE CASE:

MOORE was indicted for the first degree murder of a 74 year old white man who was a security guard at New College in Sarasota.

MOORE had been on and around the New College campus from early in the afternoon until 12:00 a.m. During this time, he had been drinking wine with some of the students, and asking everyone he met if they knew where "Tony from Gainesville" was. He was ejected from several dormitory rooms which he had entered without permission. He entered a coed's room and awaken her with his hands around her neck, attempting to kiss her. She ran from her room and he

gave chase. The victim, a security guard armed with a holstered pistol, attempted to restrain MOORE, who thereupon took the victim's gun away, shot and killed him.

A plea of not guilty was entered. Following trial, the jury returned a verdict of guilty. The Court made no separate findings of fact and sentenced the defendant to life imprisonment. The transcript of the sentencing hearing was not included in the record.

DEFENDANT:

Name: THOMPSON, LARRY, a/k/a MACK ANTHONY LEWIS
Age: 17 years
Race: Not available from Record
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at Supreme Court.

TRIAL PROCEEDINGS:

Circuit Court, Orange County, Case No.

JURY RECOMMENDATION:

Life (unanimous)

SENTENCE OF COURT:

Death; Judgment entered on January 1, 1974.

APPELLATE PROCEEDINGS:

Supreme Court, Case No. 45,107

SUMMARY OF THE CASE:

THOMPSON was indicted by an Orange County Grand Jury for the first degree murder of a year old white male on October 4, 1973.

THOMPSON and an accomplice armed with a knife, robbed a Royal Castle restaurant. They grabbed the money from the cash register and fled. The victim pursued them and caught up with THOMPSON in the parking lot. THOMPSON grabbed the knife and stabbed the victim 3 times, twice in the chest and once in the back.

THOMPSON entered a plea of not guilty and following the verdict of guilty, the jury unanimously recommended life imprisonment. The Court made no separate finding of fact and sentenced the defendant to death.

The aggravating circumstances present in the record: (A) it was committed for pecuniary gain; (B) the capital felony was committed while fleeing from a robbery; and (C) was especially heinous, atrocious and cruel. The mitigating circumstances gleaned were that THOMPSON had no significant prior criminal activity, crime was committed under extreme duress and the defendant's age being 17 years.

DEFENDANT:

Name: BURCH, JACKSON B.
Age: 23 years
Race: Black
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at Supreme Court.

TRIAL PROCEEDINGS:

Circuit Court, Palm Beach County, Case No.

JURY RECOMMENDATION:

Life

SENTENCE OF COURT:

Death, Judgment entered March 29, 1974.

APPELLATE PROCEEDINGS:

Supreme Court, Case No. 45,359

SUMMARY OF THE CASE:

BURCH was indicted by a Palm Beach County Grand Jury for the first degree murder of PAMELA CURRY, a white girl on April 10, 1973.

BURCH, a gardner at a house on Palm Beach, saw the victim walking alone on the beach. He accosted her at knifepoint and forced her to go to a small pumphouse

on the beach. He attempted to rape her, however, he prematurely ejaculated and was unable to achieve penetration. He kept trying to maintain an erection to no avail. The victim refused to lie still and began struggling to free herself, whereupon BURCH stabbed her 36 times with his knife. He then buried her under the floorboards of the pumphouse. He was arrested two days later.

The defendant entered a plea of not guilty (by reason of insanity). The jury returned a verdict of guilty and recommended life imprisonment. The Court made a separate find of fact and sentenced the defendant to death. The aggravating circumstances the Court found were that (1) the capital felony was committed while attempting to rape and (2) the crime was especially heinous, atrocious and cruel. The mitigating circumstances found were that (2) BURCH had no significant prior criminal activity, and (2) that he had an impaired capacity to appreciate the criminality of his conduct or to conform to the requirements of the law.

DEFENDANT:

Name: TICE, JOHN HENRY
Age: 43 years
Race: Black
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at Second District Court of Appeal.

TRIAL PROCEEDINGS:

Circuit Court, DeSoto County, Case No.

JURY RECOMMENDATION:

TICE waived his right to an advisory sentence.

SENTENCE OF COURT:

Life; Judgment entered August 26, 1974

APPELLATE PROCEEDINGS:

District Court of Appeal, Second District, Case No. 74-1134

SUMMARY OF THE CASE:

TICE was indicated by a DeSoto County Grand Jury for the first degree murder of his girlfriend.

In the early evening, the defendant and the victim talked by phone. The victim stated that she wanted to break off their relationship. The defendant came to her home to talk further about the matter. During their conversation, the defendant shot the victim with a .25 caliber pistol which he was carrying. There was testimony that the defendant had been drinking although not enough to be considered legally intoxicated.

A plea of not guilty was entered. The jury returned a verdict of guilty. The defendant waived his right to a jury recommendation on sentencing.

The Court made no finding of fact as aggravating and/or mitigating circumstances and sentenced the defendant to life. There was no mention in the sentence of 25 years without any possibility of parole.

DEFENDANT:

Name: GARMISE, LLOYD
Age: 21 years
Race: White
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at Third District Court of Appeal

TRIAL PROCEEDINGS:

Circuit Court, Dade County, Case No.

JURY RECOMMENDATION:

Life

SENTENCE OF COURT:

Life; Judgment entered May 4, 1974

APPELLATE PROCEEDINGS:

Third District Court of Appeal, Case No. 74-1134

SUMMARY OF THE CASE:

GARMISE was indicted by a Dade County Grand Jury for first degree murder of his college roommate.

GARMISE and the victim, college students, shared a house with two other people. They had a history of arguments. GARMISE stated that on May 16, 1973, the victim became angry at him over a dirty plate, and

came after him in his small bedroom with a butcher knife. GARMISE grabbed a loaded pistol kept near his bed and shot the victim. The State contended the victim's three gunshot wounds, two in front and one in back, were inflicted by GARMISE to carry out his well-planned murder of the victim.

The jury returned a verdict of guilty and recommended a life sentence. GARMISE received a life sentence.

From the record, it would appear that the only aggravating circumstance which existed was that the crime was especially heinous, atrocious, or cruel. The State supported this by arguing the age of the victim and the fact he was shot in the back. It would further appear that the only mitigating circumstance which existed was the defendant's age.

DEFENDANT:

Name: PALMER, ANGELO
Age: 54 years
Race: Black
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at Second District Court of Appeal.

TRIAL PROCEEDINGS:

Circuit Court, Hillsborough County, Case No.

JURY RECOMMENDATION:

Life.

SENTENCE OF COURT:

Life; Judgment entered on

APPELLATE PROCEEDINGS:

Second District Court of Appeal, Case No. 73-892

SUMMARY OF THE CASE:

DEFENDANT:

Name: ELLEY, Jim E.
Age: 24 years
Race: White
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at Second District Court of Appeal

PLEA NEGOTIATIONS:

ELLEY pled guilty to first degree murder in exchange for life sentence. No jury was impaneled for sentencing, Circuit Court, Pinellas County, Case No. 74-801.

SENTENCE OF COURT:

Life; Judgment entered June 24, 1974.

APPELLATE PROCEEDINGS:

Second District Court of Appeal, Case No.

SUMMARY OF THE CASE:

ELLEY was indicted for the first degree murder of an elerly white woman in St. Petersburg, Florida.

The defendant and two other men accosted an elderly white woman in St. Petersburg, and forced her to get into ELLEY'S car. The four then drove to an isolated area, robbed the victim of her jewelry and money, then strangled and beat her to death.

The Court made no finding of fact as to aggravating and mitigating circumstances.

DEFENDANT:

Name: JOLLY, HORACE N.
Age: Not available from Record
Race: Black
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at Second District Court of Appeal

TRIAL PROCEEDINGS:

Circuit Court, Hillsborough County, Case No.

JURY RECOMMENDATION:

Life

SENTENCE OF COURT:

Life; Judgment entered June 4, 1974.

APPELLATE PROCEEDINGS:

Second District Court of Appeal, Case No. 74-756

SUMMARY OF THE CASE:

JOLLY was indicted for the first degree murder of a Greek immigrant taxi driver in Tampa.

JOLLY was a passenger in the victim's cab at approximately 10:45 p.m. When the driver arrived at the destination, JOLLY, seated in the rear seat, drew a pistol and demanded the driver's money. JOLLY then shot the driver in the head, grabbed the money and ran.

A plea of not guilty was entered. The jury returned a verdict of guilty and recommended a life sentence. The Court made no separate finding of fact as to aggravating and mitigating circumstances and sentenced the defendant to life in prison (without mention of the twenty-five year minimum sentence).

The record indicates that the murder was committed during a robbery for pecuniary gain. The State also contended that the murder was especially heinous, atrocious and cruel. No mitigating circumstances were apparent.

DEFENDANT:

Name: BURT, JAMES
Age: 49
Race: Black
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at Second District Court of Appeal

TRIAL PROCEEDINGS:

Circuit Court, Polk County, Case No.

JURY RECOMMENDATION:

No advisory sentence given. The State was not seeking the death penalty.

SENTENCE OF COURT:

Life; Judgment entered May 7, 1974.

APPELLATE PROCEEDINGS:

Second District Court of Appeal, Case No.
Affirmed in *per curiam* decision, December 3, 1974.

SUMMARY OF THE CASE:

BURT was indicted for the first degree murder of a 36 year old black male in Polk County. The victim was at the home of BURT'S former girlfriend at about 2:00 a.m. BURT came to the house where the victim and the woman were watching television, and he was admitted into the house. He went to the bathroom while the victim and the woman continued to watch television for about 15 minutes. BURT came back into the living room and shot the victim with a pistol; the victim managed to get from the house out to the street where he fell. BURT got in his car and ran over the victim several times with his car, then drove off.

A plea of not guilty was entered. The jury returned a verdict of guilty. The State did not seek the death penalty, and no sentencing trial was held. BURT was sentenced to life in prison.

COMMENT:

The Court apparently considered that evidence of BURT'S somewhat retarded mental condition sufficiently overcame the cruelty of this matter.

DEFENDANT:

Name: MATHIS, HERBERT LEE
Age: Not available from Record
Race: Black
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at Second District Court of Appeal

TRIAL PROCEEDINGS:

Circuit Court, Sarasota County, Case No.

JURY RECOMMENDATION:

Life

SENTENCE OF COURT:

Life; Judgment entered on October 18, 1974.

APPELLATE PROCEEDINGS:

Second District Court of Appeal, Case No. 74-1288

SUMMARY OF THE CASE:

MATHIS was indicted for the first degree murder of a white man in his late twenties.

The victim, married and the father of a child, had gone to a "Black" night club in Sarosata seeking to engage a Black prostitute for the evening. He made a bargain for $15 with an attractive "lady" who was, in fact, a female impersonator. They left the club and went to the victim's car in the parking lot. As they got into the car, a young Black man (an accomplice of the defendant) slid into the front seat beside the victim's date and demanded that the victim hand over his wallet. As the victim turned to speak to the accomplice, MATHIS, who was standing next to the driver's window, shot the victim with a pistol.

No transcript of the sentencing hearing was available, but it appears from the record that the State waived the death penalty.

DEFENDANT:

Name: DETTMER, TERRY
Age: 20 years
Race: White
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at Second District Court of Appeal

TRIAL PROCEEDINGS:

Circuit Court, Hillsborough County, Case No.

JURY RECOMMENDATION:

Life

SENTENCE OF COURT:

Life;

APPELLATE PROCEEDINGS:

District Court of Appeal, Second District, Case No.
Affirmed in *per curiam* decision, November 27, 1974.

SUMMARY OF THE CASE:

DETTMER went to the home of the victim, a 25-year old woman, in the late evening and was apparently admitted to the house. The victim was stabbed repeatedly in the chest and back. Her cries awakened her 4 year old son, who ran into the living room where the attack was taking place and tried to stop the attack. He victim managed to make her way from the house to the sidewalk, where she expired from loss of blood. The defendant was seen by a witness a few minutes after the attack, and, when asked about the great amounts of blood on his slacks, he replied "Oh, I killed her, didn't you know."

A plea of not guilty was entered. The jury returned a verdict of guilty, and recommended a life sentence. The Court made no separate finding of fact as to aggravating and mitigating circumstances, and sentenced the defendant to life.

The aggravating circumstances advanced by the State during the sentencing trial were (1) that the defendant knowingly created a great risk of serious bodily harm or death to many persons—the victim's 4 year old son; (2) that the crime was especially heinous, atrocious and cruel. The mitigating circumstance advanced was that the defendant's mental condition was such that he could not appreciate the criminality of his act or conform his conduct to the law.

COMMENT:

Brutal planned stabbing death.

DEFENDANT:

Name: PHILLIPS, JACK DEMPSEY
Age: 42
Race: White
Crime: First Degree Murder and
Assault with Intent to
Commit First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at Dade County Circuit Court and Third District Court of Appeal.

TRIAL PROCEEDINGS:

Circuit Court, Dade County, Case No. 73-468

JURY RECOMMENDATION:

The jury proceeding for sentencing was waived when the Judge advised attorneys that he intended to sentence the Defendant to life.

SENTENCE OF COURT:

Life, Judgment entered September 28, 1973.

APPELLATE PROCEEDINGS:

District Court of Appeal, Third District, Case No. 74-1432

SUMMARY OF THE CASE:

PHILLIPS was indicted by a Dade County Grand Jury for the first degree murder of a 42 year old white male, and Assault with intent to commit First Degree Murder of his ex-wife (the victim's girlfriend).

PHILLIPS had divorced his wife in 1971, and constant hostility had existed between them since that time. The ex-wife, the victim (her boyfriend), and the ex-wife's daughter were seated at the kitchen table of the ex-wife's home. Defendant fired a shot through the window of the home, hitting the victim in the head and killing him. The daughter ran to the neighbor's for help. Defendant entered the house. His ex-wife got a gun and hid in the bedroom. The defendant found his ex-wife and fired at her, hitting her and causing her to fall. The ex-wife related that she pretended to be dead, at which point the defendant bent over her and said, "You motherfucking son of a bitch, are you dead?" On the way out he leaned over the victim and said, "you fucking son of a bitch, are you dead too?" The defendant then went to his apartment, told his neighbor he had just shot two people, and left the area.

A plea of not guilty was entered, and following the trial, a jury brought a verdict of guilty. The defendant waived a second jury for sentencing as the judge advised the attorneys he intended to sentence the defendant to life imprisonment.

The Judge made no separate findings of fact, and on May 24, 1974, he sentenced the defendant to life imprisonment.

Based on the foregoing facts it would appear that the only aggravating circumstance which existed was that the murder was especially heinous, atrocious, or cruel.

It would further appear no mitigating circumstances existed.

DEFENDANT:

Name: STONE, TROY
Age: 32 years
Race: White
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at Second District Court of Appeal

PLEA NEGOTIATIONS:

Defendant pled guilty to first degree murder in exchange for life sentence in the Circuit Court, Polk County, Case No.

SENTENCE OF COURT:

Life; Judgment entered

APPELLATE PROCEEDINGS:

District Court of Appeal, Second District, Case No. 74-159.

SUMMARY OF THE CASE:

STONE and his brother were in a bar near Fort Mead when a fight occurred between the STONES and several other patrons of the bar. After the fight, STONE drove to Wauchula, 8 miles away, and returned with his rifle to the bar where he waited outside in the parking lot. When several of the men with whom he had been fighting emerged from the bar, STONE called to the victim. The victim walked toward STONE, who shot him.

The Court made no separate findings of fact as to aggravating and mitigating circumstances.

DEFENDANT:

Name: PROFFITT, CHARLES WM.
Age: 28 years
Race: White
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at Supreme Court

TRIAL PROCEEDINGS:

Circuit Court, Hillsborough County, Case No.

JURY RECOMMENDATION:

Death

SENTENCE OF COURT:

Death; Judgment entered March 21, 1974

APPELLATE PROCEEDINGS:

Supreme Court, Case No. 45,541

SUMMARY OF THE CASE:

PROFFITT was charged with first degree murder for stabbing the victim with a knife. He broke into victim's dwelling house at night. The victim's wife testified that she awoke to a groan only to find her husband draped in a pool of blood. A knife penetrating his stomach. She testified that a man jumped up in front of her and struck her three times in the face (the blows caused no substantial harm.) PROFFITT'S fingerprints could not be matched to fingerprints that were taken in the house.

There was evidence that PROFFITT had been drinking heavily the night of the murder.

A plea of not guilty was entered. Following trial, the jury returned a verdict of guilty and recommended the death penalty. The Court made a separate finding of

fact as to the following aggravating circumstances: (1) PROFFITT had knowingly created a great risk of death to many persons; (2) PROFFITT had been previously convicted of a burglary involving use or threat of violence to the person; (3) PROFFITT had committed burglary in perpetration of the murder; (4) The crime was especially heinous, atrocious or cruel and (5) PROFFIT had a premeditated design to commit murder.

NOTE: The trial and sentencing judge was the Honorable Walter N. Burnside, Jr., Circuit Judge.

DEFENDANT:

Name: HALLIWELL, THOMAS A.
Age: 28 years
Race: White
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at Supreme Court.

TRIAL PROCEEDINGS:

Circuit Court, Hillsborough County, Case No. 74-286

JURY RECOMMENDATION:

Death

SENTENCE OF COURT:

Death; Judgment entered on May 3, 1974.

APPELLATE PROCEEDINGS:

Supreme Court, Case No. 45,885

SUMMARY OF THE CASE:

HALLIWELL had been dating the wife of ARNOLD TRESCH (white and in his twenties) for some time. TRESCH came to the HALLIWELL'S scuba shop and an argument over MRS. TRESCH ensued. HALLIWELL struck TRESCH about the head with a heavy metal bar. He kept his shop open until the end of the day, then cut the victim's body into four quarters, using a machete, handsaw and knife, placed it in a trunk and dumped it in a creek.

HALLIWELL pled not guilty and the jury returned a verdict of guilty with a recommendation of death. The Court imposed the death penalty and made a separate finding of fact as to aggravating and mitigating circumstances. Aggravating circumstances found by the Court were that (1) HALLIWELL using unrestrained violence, murdered the victim from a premeditated design; (2) the murder was committed in a public place and created a great risk of serious bodily harm and death to many persons; (3) the murder was a compound of cruelty, brutality and meanness, and especially heinous, atrocious, cruel and grotesque murder and post mortem descration. As to mitigating circumstances, the Court found only that HALLIWELL had no significant history of prior criminal activity. The Court considered HALLIWELL would continue to be a menace to society.

DEFENDANT:

Name: DOUGLAS, HOWARD VIRGIL LEE
Age: 37 years
Race:
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record Reviewed at Supreme Court.

TRIAL PROCEEDINGS:

Circuit Court, Polk County, Case No.

JURY RECOMMENDATION:

Life (unanimous)

SENTENCE OF COURT:

Death; Judgment entered December 4, 1973.

APPELLATE PROCEEDINGS:

Supreme Court, Case No. 44,864

SUMMARY OF THE CASE:

DOUGLAS was indicted by a Polk County Grand Jury for the first degree murder of JAMES WILLIAMS ATKINS, JR., age 20, on January 17, 1973.

DOUGLAS forced, at gun point, MR. and MRS. ATKINS to drive to a remote wooded area of Polk

County, to disrobe and have sexual relations on the ground before him in the lights of the car; he then forced the ATKINS each to perform an unnatural sex act upon the other. DOUGLAS then clubbed MR. ATKINS 3 times in the head, killing him in the presence of MRS. ATKINS. He then raped MRS. ATKINS and forced her to perform an unnatural sex act on him.

DOUGLAS pled not guilty. The jury found DOUGLAS guilty and recommended life imprisonment. The Court sentenced the defendant to death and made a separate finding of fact.

The aggravating circumstances found by the court were (1) the capital felony was especially heinous, atrocious and cruel; (2) DOUGLAS was 37 years old and had a record of convictions for grand larceny, breaking and entering twice, forgery, escape three times, an undesirable discharge from the Army; and numerous misdemeanors including assault and battery, and contributing to the delinquency of a minor. The defendant's penitentiary sentences aggregated 17 years. The defense offered no mitigating circumstances and the Court found none in imposing the death sentence.

DEFENDANT:

Name: JONES, JIMMY LEE
Age: 40 years
Race: Black
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at Supreme Court

TRIAL PROCEEDINGS:

Circuit Court, Pasco County, Case No.

JURY RECOMMENDATION:

Life (unanimous)

SENTENCE OF COURT:

Death; Judgment entered September 28, 197

APPELLATE PROCEEDINGS:

Supreme Court, Case No. 44,669

SUMMARY OF THE CASE:

JONES was convicted of the rape-murder of a woman in her thirties. JONES forcible broke into the victim's home where a violent struggle took place. The victim, besides being raped, suffered 38 deep cuts from a knive and numerous other scratches and abrasions. JONES cut his hand in gaining entry, and a trail of blood led from the scene to within 50 feet of his residence. He was arrested 10 days later in Pennsylvania. The Jury unanimously recommended life imprisonment but the Judge sentenced JONES to death.

Although the Judge made no findings of fact, the record indicates the following aggravating factors: (1) JONES had a previous conviction of a felony involving use of threat to violence to a person; (2) murder was committed in connection with a rape and burglary; (3) JONES avoided arrest by fleeing to Pennsylvania; and (4) the crime was especially heinous, atrocious and cruel.

The only mitigating factors appearing from the record was JONES' mental state. JONES' wife testified that JONES felt he was being pursued and persecuted. JONES did not meet the McNaughten test according to the testimony of two psychiatrists.

DEFENDANT:

Name: DARDEN, WILLIE JASPER
Age: 40 years
Race: Black
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at Supreme Court

TRIAL PROCEEDINGS:

Circuit Court, Citrus County, Case No.

JURY RECOMMENDATION:

Death

SENTENCE OF COURT:

Death; Judgment entered on January 23, 1974.

APPELLATE PROCEEDINGS:

Supreme Court, Case No. 45,056 and 45,108

SUMMARY OF THE CASE:

DARDEN was on furlough from a Florida State Prison facility at the time of the crime. The murder occurred

as DARDEN was committing a robbery in the furniture store run by the victim and his wife. The victim's wife was held at gunpoint during the robbery. The victim was shot as he entered the back door of the store. DARDEN unsuccessfully tried to force the victim's wife to perform fellatio on him. DARDEN was also charged with assault with the intent to murder in connection with this crime. A neighbor boy who came to aid the victim was shot 3 times. DARDEN fled the scene and was involved in a one car accident and left the scene of the accident to be apprehended at his girlfriend's house. DARDEN was indicted by a Polk County Grand Jury, but the trial was moved to Citrus County where the jury recommended death.

The Judge found the following aggravating factors: (1) DARDEN was under sentence of imprisonment at the time of the crime, but by his participation in furlough program, he was out of prison on the weekend. (2) DARDEN had 2 prior convictions for unnamed crimes in the last 10 years; (3) Murder was committed in connection with an armed robbery, and a demand for an unnatural sex act; (4) the victims were innocent law abiding citizens; (5) and assault with intent to murder followed robbery and murder; and (6) the act was especially heinous, atrocious and cruel.

DARDEN'S good prison record was evidenced by his participation in furlough program was the only mitigating factor shown by the record.

DEFENDANTS:

Name: TILLMAN, GARY H.
WITT, JOHNNY PAUL
Ages: TILLMAN: 20 years
WITT: 31 years
Race: White
Crime: First Degree Murder

SOURCE OF INFORMATION:

TILLMAN: Record reviewed at Second District Court of Appeal
WITT: Record reviewed at Supreme Court

PLEA NEGOTIATIONS:

TILLMAN pled gulity of first degree murder in exchange for life sentence. There was no jury proceeding to recommend sentence.
Curcuit Court, Hillsborough County, Case No. 73-2181.

TRIAL PROCEEDINGS:

WITT: Circuit Court, Volusia County, Case No. 74-181

JURY RECOMMENDATION:

WITT: Death

SENTENCE OF COURT:

TILLMAN: Life, Judgment entered
WITT: Death; Judgment entered

APPELLATE PROCEEDINGS:

TILLMAN: District Court of Appeal, Second District, Case No. 74-646 (There is also a collateral pending at Supreme Court)
WITT: Supreme Court, Case No. 45,796.

SUMMARY OF THE CASE:

TILLMAN and WITT were indicted by a Hillsborough County Grand Jury for the first degree murder of JONATHON KUSHNER, an 11 year old white boy on October 20, 1973 in Tampa.

TILLMAN and WITT had stalked people, hunting with bow and arrow, several times before this crime. The victim was riding his bicycle to a neighborhood convenience store at 12:30 p.m. when he was abducted by the defendants. They took him to an orange grove two miles away. The defendant sexually molested the boy, beat him repeatedly with a heavy metal star drill, cut open his stomach in "field dress" style, dismembered his body, and buried him in a shallow grave. A portion of the body was taken to Homosassa, 80 miles away. WITT cut off the boy's penis, placed it in a glass bottle filled with formaldehyde, took the bottle to his home and placed it in his medicine cabinet. WITT'S wife called the police some days later and based on this tip, TILLMAN was arrested. TILLMAN then took the police to the grave site.

A severance was granted.

As a result of plea negotiations, TILLMAN pled guilty to first degree murder and was sentenced to life

imprisonment. The Judge made no findings of fact, but aggravating circumstances from the record are (1) the capital crime was committed while committing rape and kidnapping, (2) the crime was especially heinous, atrocious, and cruel.

The only mitigating circumstance was TILLMAN'S age (20 years) and an impaired capacity to conform his conduct to the requirements of the law.

WITT was tried in Volusia County, found guilty with a jury recommendation of death. The Judge found that the murder was committed during a kidnapping, that it was especially heinous, atrocious and cruel and that WITT'S actions had created risk of death and harm to many persons and that indeed, WITT'S continued existence presented a great risk of death to many persons. In addition, WITT had been convicted of two previous felonies. The Judge found that the only mitigating circumstance was WITT'S age, and concluded that he is a menace to society without promise of rehabilitation.

DEFENDANT:

Name: TEDDER, MACK REED II
Age: 20 years
Race: White
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at Supreme Court

TRIAL PROCEEDINGS:

Circuit Court, Hernando County, Case No.

JURY RECOMMENDATION:

Life

SENTENCE OF COURT:

Death; Judgment entered on August 20, 1974.

APPELLATE PROCEEDINGS:

Supreme Court, Case No. 46, 267

SUMMARY OF THE CASE:

TEDDER went to his mother-in-law's mobile home where his estranged wife and infant child were living. The three were in the yard as TEDDER approached. He fired some shots with a pistol in the direction of the three, and the mother-in-law told her daughter to run into the house and get her father's shotgun. She ran with her child into the bedroom and unsuccessfully attempted to load the gun. TEDDER pursued the mother-in-law into the house and shot her. He opened the door to the bedroom and forced his wife and child to go with him in his car to Bardenton to his father's farm. The mother-in-law was found some hours later, and she died in the hospital.

A plea not guilty was entered. Following trial, the jury returned a verdict of guilty and recommended a life sentence.

The Court made a separate finding of fact as to the following aggravating and mitigating circumstances. The aggravating circumstances were (1) the defendant

knowingly created a great risk of death to many persons, his wife, his infant child and the victim; (2) the capital felony was committed while he was engaged in the commission of the kidnapping of his wife, all testimony reflecting that he also forceably took his wife from her domicile in Masaryktown to Bradenton, Florida, and held her against her will until she was rescued by the Sheriff's Department of Bradenton; (3) the victim died as a result of especially heinous, atrocious, and cruel acts by the defendant, in that after he shot the victim, he (a) refused to permit his wife to assist her mother, (b) refused to assist the victim, (c) left the victim in such condition that she was unable to obtain assistance for herself.

In the sentencing trial, the defense advanced as mitigation, the defendant's age, 20, and that the defendant was under the influence of extreme mental or emotional disturbance as he was going through a divorce.

Upon this finding of fact, the court sentenced the defendent to death.

DEFENDANT:

Name: HALLMAN, CLIFFORD
Age: 23 years
Race: White
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at Supreme Court

TRIAL PROCEEDINGS:

Circuit Court, Hillsborough County, Case No.

JURY RECOMMENDATION:

Death

SENTENCE OF COURT:

Death; Judgment entered on August 12, 1973.

APPELLATE PROCEEDINGS:

Supreme Court, Case No. 44,579
Affirmed in *per curiam* opinion, December, 1974.

SUMMARY OF THE CASE:

The incident occurred between 2:00 p.m. and 4:00 p.m. on April 4, 1973, while HALLMAN and the victim (the barmaid, a young white woman) were alone in a bar. HALLMAN cut the barmaid on the neck with a piece of broken glass and stole $34.40 from the cash register. The victim died four days later of brain stem necrosis caused by the lacerations on her neck. A witness, a barmaid in a nearby bar, ran to the scene in response to a call and testified that the victim stated "CLIFFORD cut me for money." The same witness testified that she saw HALLMAN enter the bar about 2:00 p.m. and leave about 3:45 p.m. with blood smeared on his hands.

A plea of not guilty was entered. The Jury returned a verdict of guilty and recommended death. The Court

made a separate finding of fact and sentenced the defendant to death. In its finding of fact, the trial Court concluded that the following aggravating circumstances were applicable that the crime was committed for pecuniary gain, that the crime was especially heinous, atrocious, or cruel, that the homicide occurred while HALLMAN was engaged in the commission of a robbery, and that HALLMAN had previously been convicted of assault and battery and breaking and entering an automobile with intent to commit assault and battery. The Court considered HALLMAN'S age, 23, to be a mitigating circumstance. Two psychiatrists testified that HALLMAN suffered from a character behavioral disorder, that he was a sociopath and that he was a mentally disordered sex offender under F.S. §917.19.

DEFENDANT

Name: SULLIVAN, ROBERT
Age: 25 years
Race: White
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at Supreme Court

TRIAL PROCEEDINGS:

Circuit Court, Dade County, Case No.

JURY RECOMMENDATION:

Death

SENTENCE OF COURT:

Death; Judgment entered on November 12, 1973.

APPELLATE PROCEEDINGS:

Supreme Court, Case No. 44,750
Supreme Court affirmed the decision on December , 1974.

SUMMARY OF THE CASE:

SULLIVAN, a 25 year old white University of Miami student was indicted for the first degree murder of a restaurant manager.

An accomplice, who pled guilty, testified that SULLIVAN and the accomplice robbed a Howard Johnson's restaurant immediately after it had closed for the night. They abducted the manager of the restaurant at gunpoint, tied his hands behind him and drove to a swampy area. They told the manager that he would be released without his clothing, although the accomplice stated that SULLIVAN had earlier stated that he wanted to kill. The two robbers and the victim got out of the car and the victim was forced to walk in the swamp. SULLIVAN was walking behind the victim. While walking, the victim slipped and fell. SULLIVAN struck him twice with a tire iron, got a shotgun from the accomplice, shot him in the back of the head with both barrels while the victim was prone, reloaded and shot both barrels again, and said "I don't feel no different".

A plea of not guilty was entered. Following trial, the jury returned a verdict of guilty and recommended the

death penalty. The Court made a separate finding of fact aso the following aggravating and mitigating circumstances; AGGRAVATING CIRCUMSTANCES: (A) The death of the victim occurred while the defendant was engaged in the commission of a crime of armed robbery; (B) the capital felony was committed for pecuniary gain as the victim has been robbed of all his personal possessions as well as possessions of the company he represented; (C) the crime was especially heinous, atrocious and cruel. "The defendant saw fit to braggadociously state that he wanted a 'crime' which in his mind was to be the 'perfect crime.' " The victim was bound with his hands behind his body with adhesive tape, mentally toyed with by the defendant as to operating and management techniques of the establishment where worked, a place where the defendant was previously employed. After this mental exercise, the victim was led to a lonely spot in Dade County with his hands still behind him and as he stumbled in the darkness, struck from behind with a tire iron and then again from behind while on the ground in a totally helpless position, was mortally wounded with four blasts from a 12 gauge shotgun to the back of the head. "This Court cannot conceive of a more conscienceless crime". and (D) "This Court has observed the demeanor and the actions of the defendant throughout the trial and has not observed a scintilla of remorseness displayed, indicating full well to this Court that the death penalty is the proper selection of the punishment in this particular case".

The Court found the only mitigating circumstances, being the defendant's age, 25 years, not sufficient mitigation.

Upon this finding of facts the court sentenced the defendant to death.

DEFENDANT

Name: PEOPLES, SYLVESTER
Age: Not available from record
Race: Black
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at Second District Court of Appeal

TRIAL PROCEEDINGS:

Circuit Court, Hillsborough County, Case No.

JURY RECOMMENDATION:

Death

SENTENCE OF COURT:

Life;

APPELLATE PROCEEDINGS:

Second District Court of Appeal, Case No. 73-591
Affirmed in *per curiam* decision, May 8, 1974.

SUMMARY OF THE CASE:

PEOPLES had stationed himself at a second story window across the street from his girlfriend's house

where she was sitting with the victim, a young black man, on the porch. PEOPLES knew the victim and had had several arguments with him over the girlfriend. PEOPLES shot the victim in the head with a rifle, ran from the house, still carrying the rifle, turned himself in to a policeman.

A plea of not guilty was entered. The Jury returned a verdict of guilty. The State stipulated that there were no aggravating circumstances to warrant jurors determining that the defendant should be given the death penalty.

The Court made no separate finding of fact and sentenced the defendant to life with a recommendation that the parole board not review his case for 20 years.

NOTE: The trial and sentencing judge was the Honorable Walter N. Burnside, Jr., Circuit Judge.

DEFENDANT:

Name: MARTIN, ROBERT LEE
Age: 17 years
Race: Black
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at Dade County Circuit Court.

PLEA NEGOTIATIONS:

MARTIN pled guilty to first degree murder in exchange for life sentence. He then testified against co-defendant

at a subsequent trial. There was no jury impaneled to recommend sentence.

SENTENCE OF COURT:

Life; Judgment entered on March 12, 1974.

APPELLATE PROCEEDINGS:

District Court of Appeal, Third District, Case No. 74-1409

SUMMARY OF THE CASE:

MARTIN was indicted by a Dade County Grand Jury for first degree murder of a white, female junior college student.

MARTIN was with two other boys in a junior college parking lot after a football game, when they spotted a young girl in a parked car. Defendant approached the victim and asked for a cigarette, which she gave him. The defendant then discussed with his two friends the possibility of raping her, and allegedly attempting robbery. The victim sprayed mace at the defendant from a small can she kept in her car. The defendant then shot the victim in the eye.

A plea of guilty was entered. The Court accepted the plea, and in accord with the terms of the plea negotiations, sentenced the defendant to life imprisonment. No separate findings of fact were made.

Based on the foregoing fact, it would appear the following aggravating circumstances existed: the crime

was committed while the defendant was commiting or attempting robbery and rape; it was committed for pecuniary gain; and was especially heinous, atrocious and cruel.

It would further appear the only mitigating circumstance which existed was age.

DEFENDANTS:

Name: MORRIS, CALVIN
SWAN, LLOYD
Ages: MORRIS: 16 years
SWAN: 19 years
Races: MORRIS:
SWAN:
Crime: First Degree Murder

SOURCE OF INFORMATION:

TRIAL PROCEEDINGS:

Circuit Court, Dade County, Case No.

JURY RECOMENDATION:

Life for both defendants

SENTENCE OF COURT:

MORRIS; Life
SWANN: Death

APPELLATE PROCEEDINGS:

MORRIS: District Court of Appeal, Third District, Case No.
SWAN: Supreme Court, Case No.

SUMMARY OF THE CASE:

MORRIS and SWAN were indicted by a Dade County Grand Jury for the first degree murder of HONEY REA, a 49 year old white woman on May 29, 1973. The indictment was predicated on the felony murder rule.

The defendants broke into a residence at night where the victim was a live-in housekeeper. The residence was rifled and various items were stolen. The victim was bound, gagged and beaten. She died a week after the attack.

A plea of not guilty was entered. Following trial, the jury returned a verdict of guilty and recommended a life sentence for both SWAN and MORRIS. The Court sentenced MORRIS to life imprisonment and SWAN to death and made separate findings of fact as to aggravating and mitigating circumstances. The Court found (1) that MORRIS and SWAN broke and entered the premises and committed an assault on the victim; (2) the capital felony was heinous, atrocious and cruel. SWAN had been adjudicated guilty of resisting arrest with violence, but the Court said this fact would not be considered an aggravating circumstance.

The Court found the mitigating circumstances were MORRIS' age (16 years), SWAN'S age (19 years) and

that MORRIS had no significant history of prior criminal activity.

DEFENDANT:

Name: SMITH, KENNETH TYRONE
Age: 15 years
Race: Black
Crime: First Degree Murder and Assault with Intent to Commit First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at Circuit Court in Dade County.

TRIAL PROCEEDINGS:

Circuit Court, Dade County, Case No. 73-5469B

JURY RECOMMENDATION:

SENTENCE OF COURT:

Life; Judgment entered on May 24, 1974.

APPELLATE PROCEEDINGS:

SUMMARY OF THE CASE:

SMITH was indicted by a Dade County Grand Jury for first degree murder of a 17 year old white male, and assault with intent to comm first degree murder of another 17 year old white male.

The facts and circumstances of the crime, taken from the co-defendant's statement and substantiated by the surviving victim, are as follows: The two victims had approached the defendant, offering him $10.00 to buy reefers for them. SMITH, high on drugs, told the co-defendant he wanted to net more than $10.00, and intended to rob the victims. SMITH and the co-defendant then approaced the victims' car. SMITH pulled out a pistol and told the victims to exit from the car, and demanded their money. One victim pulled out a knife. SMITH then shot both, killing one and injuring the other.

A plea of guilty was entered in the Juvenile Court and accepted by the Judge. SMITH was subsequently indicted by a grand jury, pled not guilty, and was tried. The jury brought in a verdict of guilty.

The court made no separate finding of fact and sentenced the defendant to life imprisonment for the murder and 10 years for assault with intent to commit first degree murder, to run concurrently.

Based on the foregoing facts it would appear that the following aggravating circumstances existed: the murder was committed while the defendant was committing or attempting a robbery; it was committed for pecuniary gain; and it was especially heinous, atrocious, or cruel.

It would further appear the following mitigating circumstances existed: the age of the defendant, and possibly that due to drugs, the defendant was under extreme mental or emotional disturbance, and had an impaired capacity to appreciate the criminality of his conduct or conform to requirements of law.

DEFENDANT:

Name: SMITH, DARNELL
Age: 17 years
Race: Black
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at First District Court of Appeal.

PLEA NEGOTIATION:

SMITH pled guilty in exchange for life sentence in the Circuit Court of Duval County, Florida, Case No. 73-4613-CF

JURY RECOMMENDATION:

There was no jury impaneled to recommend sentence.

SENTENCE OF COURT:

Life; Judgment entered March 1, 1974.

APPELLATE PROCEEDINGS:

First District Court of Appeal, Case No. V-331
Affirmed in *per curiam* decision.

SUMMARY OF THE CASE:

SMITH pled guilty to the first degree murder of LEROY THOMAS during an armed robbery of Church's Fried Chicken in Jacksonville on November 16, 1973. The Record on Appeal does not give further details of the crime.

The record indicated that there were no aggravating circumstances other than that the crime was committed during the commission of a robbery and that mitigating circumstances were SMITH's age, his lack of prior criminal activity, and his questionable ability to appreciate the criminality of his conduct. Defense motions for judgment of insanity were denied, and SMITH pled guilty to first degree murder with the understanding that the Court would sentence him to life in prison. A pre-sentence investigation was ordered by the Court and SMITH was subsequently sentenced to life in prison. There is no finding of fact in the record.

DEFENDANTS:

Names: FLICKER, ARNOLD
FLICKER, DAVID
MAGNANI, PAUL
HESTER, DAVID
FRANCIS, KENNETH
BROWN, MICHAEL
GEASLIN, ELVIS
SIMMONS, BRUCE

Ages: FLICKER, ARNOLD: middle-aged
FLICKER, DAVID: 20 years
All others in late teens

Races: All White

Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at Circuit Court of Volusia County.

PLEA NEGOTIATIONS:

DAVID FLICKER pled guilty to *third degree murder.* DAVID HESTER, BRUCE SIMMONS and KENNETH FRANCIS pled guilty to *first degree murder,* in exchange for life sentences.

TRIAL PROCEEDINGS:

MAGNANI, BROWN and GEASLIN, Circuit Court, Volusia County, Case No.

JURY RECOMMENDATION:

Life

SENTENCE OF COURT:

Life

APPELLATE PROCEEDINGS:

SUMMARY OF THE CASE:

MAGNINI, HESTER, FRANCIS, BROWN, GEASLIN, AND SIMMONS, all white and in their late teens, were indicted for the first degree murder of MRS. VIVIAN OYLER, an elderly white woman in Volusia County, on October 2, 1973.

ARNOLD FLICKER, a middle-aged white man and his son, DAVID FLICKER, age 20, recruited BROWN and MAGNANI to kill MRS. OYLER for $2,500.00 because she would not sell her land to the FLICKERS. BROWN

and MAGNINI broke into the OYLER house and attempted to kill her. She managed to lock interior doors in the house so that they could not get to her and then call the police, but BROWN and MAGNINI fled before the police arrived. Undaunted, a second attempt was made a few days later. BROWN and DAVID FLICKER went to the house, and while BROWN attempted to silence a dog on the premises with a can of dog repellent, DAVID FLICKER cut the telephone wires leading into the house. The dog was not overcome by the repellent, however, and his barking frightened away the would-be attackers. They then decided that if they were to kill MRS. OYLER they would need additional help.

HESTER, GEASLIN, SIMMONS and FRANCIS were recruited from the boardwalk in Daytona Beach. A week before the murder, several of the defendants dug a grave in an isolated area of the County. On the afternoon of October 2, 1973, DAVID FLICKER and BROWN inspected the grave to make sure that it was deep enough and undetected. The group assembled on the FLICKERS' property, adjoining the OYLER residence, at 8:00 p.m. and awaited darkness.

The FLICKERS gave the other members hammers and wooden mallets. After dark, two of the group went to the front of the OYLER house to distract the dog. BROWN, GEASLIN, SIMMONS, HESTER and FRANCIS all broke into the house and began beating Mrs. OYLER with the hammers and mallets. The steel-handled hammer used by SIMMONS was wielded with such force that the handle was bent. After the beating, BROWN forced a wooden mallet into the victim's vagina. They then dragged the victim across the

backyard to the FLICKER property, where she was loaded into a Corvair, taken to the grave and buried. Several of the group remained on the FLICKER property awaiting the return of the burial crew. Upon their return, the FLICKERS paid the agreed $2,500.00 fee, less a $20.00 advance. The group members drank some wine and then went their separate ways.

SIMMONS went to the bus station and talked of his experience to a drifter, who was an undercover informant. The informant called the police authorities, who arrested SIMMONS. SIMMONS gave a detailed statement which led to the arrest of the others.

ARNOLD FLICKER was adjudged incompetent to stand trial and committed to the state mental hospital. DAVID FLICKER, his son, pled guilty to third degree murder. HESTER, SIMMONS and FRANCIS all pled guilty to first degree murder and were sentenced to life imprisonment. MAGNANI, BROWN and GEASLIN pled not guilty and were convicted of first degree murder. The jury recommended life imprisonment and the court sentence them to life.

The aggravating circumstances presented for BROWN, MAGNANI and GEASLIN were that the crime was committed for pecuniary gain and that it was especially heinous, atrocious and cruel.

The mitigating circumstances common to all three were (1) no significant prior criminal activity and (2) their age (all in their late teens). BROWN attempted to show that he was under the substantial domination of MAGNANI, and MAGNANI sought to show that his mental state impaired his capacity to appreciate the criminality of his conduct or conform to the requirements of law.

The Court made no separate findings of fact in connection with any of the sentences.

DEFENDANT:

Name: GRAY, DANIEL
Age: 15 years
Race: White
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at Third District Court of Appeal.

TRIAL PROCEEDINGS:

Circuit Court, Dade County

JURY RECOMMENDATION:

Jury recommendation was included in the verdict as the jury "beg[ged] the Court for mercy and any and all services available. . . for rehabilitation."

SENTENCE OF COURT:

Life; Judgment entered March 6, 1974.

APPELLATE PROCEEDINGS:

District Court of Appeal, Third District, Case No. 74-832

SUMMARY OF THE CASE:

GRAY and a co-defendant, both 15 years old, entered a business office in the morning, the secretary letting them in because she recognized one as a part-time odd job employee of the owner. They beat the 22 year old female secretary with chukkers, promising to quit if she would stop screaming, which she did. They took $300 in cash from the office safe, and then sat waiting for the owner to arrive so they could get more money. The victim, age 60, a client of the business, came to the door. GRAY began beating him with the chukkers, and then the secretary heard a shot ring out. The victim died of a shotgun wound to the head. The defendant was in possession of the shotgun shells when arrested about 30 minutes later in the office. Who pulled the trigger was not proven at trial, but the State relied on the felony murder doctrine in closing arguments at trial.

A plea of not guilty by reason of insanity was entered, and following the trial, the jury brought in a verdict of guilty, coupled with a proviso that they "begged the court for mercy and any and all service available be extended to the defendant for rehabilitation." There was no separate sentencing proceeding held.

The court made no separate finding of fact in accepting the jury's recommendation and sentencing the defendant to life imprisonment.

Based on the foregoing facts, it would appear the following aggravating circumstances existed; murder committed while committing, attempting, aiding, or fleeing robbery; murder committed for pecuniary gain; and possibly that the murder was especially heinous, atrocious, or cruel.

It would further appear the following mitigating circumstances existed: no significant prior criminal activity; committed while under extreme mental or emotional disturbance and/or impaired capacity to appreciate criminality of conduct or conform to requirements of law (the defendant had a low IQ and drug involvement was mentioned); and the age of the defendant.

DEFENDANT:

Name: HALL, TODD ALEXANDER
Age: 17 years
Race: Black
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record review at Fourth District Court of Appeal.

TRIAL PROCEEDINGS:

Circuit Court of Indian River County, Case No. 73-151

JURY RECOMMENDATION:

Life

SENTENCE OF COURT:

Life: Judgment entered November 19, 1973.

APPELLATE PROCEEDINGS:

District Court of Appeal, Fourth District, Case No. 73-1472
Affirmed in *per curiam* decision.

SUMMARY OF THE CASE:

HALL, a 17 year old black male, was indicted for the first degree murder of a 60 year old white male in Indian River County.

On June 15, 1973, HALL and his brother OGEAN entered a small convenience store north of Vero Beach. Upon gaining entry, they grabbed Mrs. MORGAN HEINLEY and threw her to the floor. At this time, the victim (age 60 and white) emerged for the rear of the store, and HALL turned and fired one shot, striking him in the right eye, penetrating his skull and killing him. HALL claimed accidental discharge of the firearm.

At the trial, HALL strongly contended that there was no evidence of a robbery in that no words were spoken by either of the two defendants at any time nor was any money or property taken. The jury returned a verdict of guilty of first degree murder. The jury recommended a sentence of life imprisonment be imposed.

The Judge, who had also presided over co-defendant OGEAN HALL'S trial, wherein OGEAN was convicted of second degree murder, ordered a pre-sentence investigation. The defendant was returned to Court on November 19, 1973 where he was adjudged guilty and sentenced to life imprisonment.

The Judge did not make a written finding of fact but it can be established from the record that as far as aggravating circumstances are concerned there were two: (1) The offense was while in the perpetration of a robbery and (2) was intended for pecuniary gain.

By way of mitigation, it appears that the defendant had no prior significant criminal activity and that his age was a major consideration.

The conviction and sentence were affirmed by the Fourth District Court of appeal in a per curiam decision.

DEFENDANT:

Name: BISSONETTE, ROY IVAN
Age: 15 Years
Race: Not available from record
Crime: First Degree Murder and Robbery

SOURCE OF INFORMATION:

Record reviewed at Fourth District Court of Appeal.

TRIAL PROCEEDINGS:

Circuit Court, Brevard County, Case No. 73-440

JURY RECOMMENDATION:

Life (unanimous)

SENTENCE OF COURT:

Life; Judgment entered August 24, 1973

APPELLATE PROCEEDINGS:

District Court of Appeal, Fourth District, Case No. 73-1163.

SUMMARY OF THE CASE:

BISSONETTE was indicted in Brevard County for murder in the first degree and robbery, in the shooting death of a 30 year old white male.

On March 12, 1973, BISSONETTE was hitchhiking back to his home state of New Jersey. He was picked up by the victim along the highway in Brevard County. After riding along for some time, it was claimed by BISSONETTE that the victim made indecent sexual advances against him. At this time, BISSONETTE secured a .32 caliber pistol and apparently shot the victim numerous times. The victim's body was found in some underbrush along the roadside with five shots in the head, two shots in the right arm, four shots in the chest and one shot in the hand – 12 wounds in all.

The defendant was aprehended some distance up the road, and a check run on the automobile determined that it was not his. Also, found in the defendant's possession in addition to the pistol was a wallet and credit cards belonging to the victim.

The defense at the trial was self-defense. The defendant was found guilty of first degree murder.

During the sentencing hearing it appeared that the following aggravating circumstances were present; (1) the defendant had a substantial juvenile record, (2) the capital felony was committed during the perpetration of a robbery, and (3) the capital felony was committed for pecuniary gain.

The only mitigating circumstance was that the defendant was only 15 years old. After deliberating four minutes, the jury unanimously recommended a life sentence. The Judge followed the jury's recommendation.

COMMENT:

The defense of self-defense was apparently rejected because the gun had to be reloaded to shoot the victim so many times. The Judge at the sentencing hearing did not allow cross-examination of defense witnesses.

DEFENDANT:

Name: MC BRIDE, ALPHONSO
Age: 17 years
Race: Black
Crime: First Degree Murder

SOURCE OF INFORMATION:

Record reviewed at Fourth District Court of Appeals.

TRIAL PROCEEDINGS:

Circuit Court, Indian River County, Case No. 73-15

JURY RECOMMENDATION:

Life

SENTENCE OF COURT:

Life; Judgment entered August 9, 1973.

APPELLATE PROCEEDINGS:

District Court of Appeal, Fourth District, Case No. 73-1047
Affirmed in *per curiam* decision

SUMMARY OF THE CASE:

On December 13, 1972, MC BRIDE apparently arrived at a Seven Eleven at the South County Line in Vero Beach, Florida. He entered the store and, during an attempt to steal the money from the cash register, got into a fight with the proprietor there. He pistol whipped the individual severely about the face and head and then fired one shot, killing the victim. The money in the cash register was taken.

The jury found MC BRIDE guilty of first degree murder. The following aggravating circumstances appeared to be present: The murder was committed during the perpetration of a robbery, and that it was committed for pecuniary gain. It was also arguable that it was especially heinous, atrocious and cruel in that evidence was presented to show that the defendant had robbed the same store and the same proprietor approximately a week before. At the time of this previous robbery he had clicked the revolver in the man's face several times and told him that the next time he came to rob he was going to kill him.

By way of mitigating circumstances, the defendant established that he had no prior criminal activity and his age being 17 years was taken into consideration. The jury returned a recommendation of life imprisonment.

The Judge then ordered a pre-sentence investigation and upon its return on August 9, 1973, adjudge the defendant to be guilty and sentenced him to life imprisonment with a minimum of 25 years to be served. The Judge did not make any written findings of fact.

DEFENDANT:

Name: DOBBERT, ERNEST JOHN
Age: 33 years
Race: White
Crime: First Degree Murder of Two Children; Child Torture of Two Children; Child Torture and Child Abuse of Two Children.

SOURCE OF INFORMATION:

Record reviewed at Supreme Court.

TRIAL PROCEEDINGS:

Circuit Court, Duval County, Case No.

JURY RECOMMENDATION:

Life (10 to 12 jurors recommended life sentence)

SENTENCE OF COURT:

Death; Judgment entered April 12, 1974.

APPELLATE PROCEEDINGS:

Supreme Court, Case No. 45,558

SUMMARY OF THE CASE:

ERNEST JOHN DOBBERT, III, age 11, scarred, battered, broken arm, and poor visioned, ran away from home on April 6, 1972 and was later discovered by authorities. He subsequently revealed that the scars and bruises were caused by severe beatings from his father. He further alleged that he and his brothers and sisters, KELLY ANN (9), RYDER SCOTT (7), and HONORE ELIZABETH (5), had been systematically subjected to brutality by his father. He further alleged that KELLY ANN and RYDER SCOTT were dead, KELLY ANN alleged to have died of the flu, and RYDER SCOTT of cancer, and that he had assisted his father in the burials. JOHN also alleged that his brother and sister were buried because his father did not want the authorities to see the wounds. The defendant subsequently confessed to Father Anthony J. Muldery of St. Anthony's Church in Ft. Lauderdale, Florida. He stated that two of his children had died of natural causes and that he had buried the children himself in an unknown cemetery in Jacksonville. Approximately one month later, DOBBERT was arrested in Houston, Texas. The bodies of the children were never found.

DOBBERT was sentenced to death on the first count of the indictment for murder of one child and to consecutive sentences of the maximum penalty of 46 years on the other counts of the indictment. In a detailed finding of fact, encompassing several pages, the Judge explicitly delineated prior offenses by DOBBERT against his children, including punishing ERNEST by burning his hand over an open flame on a gas range; kicking, choking and beating KELLY, ERNEST and HONORE.

The Judge listed the aggravating circumstances also as the prevention of arrest, prosecution and imprisonment by terrorizing and brutalizing the children and by lies and deception towards police and social agencies when they would come to investigate complaints. He noted that there were several charges of assault previously against the children in Wisconsin, that DOBBERT knowingly created a risk of death to many persons, that DOBBERT constantly beat his daughter, KELLY, causing her to be violently and chronically ill from the torture, that these murders and series of unspeakeable horrors and sadism against the children combined to make this what the Judge termed in his 22 years of legal experience, the most heinous, atrocious and cruel crime he had ever seen.

As to mitigating circumstances, the Judge prevented several considerations that might have constituted mitigating circumstances such as psychiatric testimony but concluded that even the psychiatrist said that DOBBERT understood the nature and quality and wrongfulness of his acts, knew right from wrong and was able to adhere to the right. In listing several other items of fact under each mitigating circumstance that could possibly be considered, the Judge concluded that there were *no* mitigating circumstances present.

DEFENDANT:

Name: GOULD, CARLTON
Age: about 25 years
Race: Black
Crime: First Degree Murder

SOURCE OF INFORMATION:

Conference with trial court counsel.

PLEA NEGOTIATIONS:

GOULD pled guilty in the Circuit Court of Putnam County.
No jury was impaneled for recommendation of sentence.

SENTENCE OF THE COURT:

Life;

APPELLATE PROCEEDINGS:

Counsel indicated that no appeal is planned.

SUMMARY OF THE CASE:

GOULD brutally stabbed to death an elderly well-respected woman alone in her store when she allegedly caught him shoplifting. After the murder, he took the money from the cash register. Defense counsel indicated that GOULD had a bad record with convictions for several other crimes. Community feeling in Palatka was extremely high against GOULD. Plea negotiations were held, and GOULD pled guilty to the murder and to several other crimes in exchange for a life sentence. Defense counsel indicated that there were no mitigating circumstances.

DEFENDANT:

Name: MARTIN, EVANS
Age: 25 years
Race: White
Crime: First Degree Murder

SOURCE OF INFORMATION:

Conference with trial court counsel.

TRIAL PROCEEDINGS:

Circuit Court, Highland County

JURY RECOMMENDATION:

Life

SENTENCE OF COURT:

Life

APPELLATE PROCEEDINGS:

Defense counsel indicated that no appeal is planned.

SUMMARY OF THE CASE:

MARTIN and a co-defendant JAMED EDWARD KEEL murdered MARTIN'S father-in-law for some money the believed he carried in the trunk of his car. The two had bought some stolen Travelers Checks in North Carolina and had come to Florida on a spree.

MARTIN had a criminal record in North Carolina, including grand larceny, breaking and entering and charges of conspiracy to commit robbery.

On the pretense of visiting the victim at his home, MARTIN and KEEL shot him from behind and got the key to the trunk of the car. The victim, however, had

transferred his money to a safety deposit box and a savings account. KEEL pled guilty and testified for the State. MARTIN was found guilty of first degree murder, and the jury recommended life and the Judge sentenced him to life in prison.

COMMENT:

Planned murder for pecuniary gain.

DEFENDANT:

Name: HUCKLEBURY, CHARLES
Age: 27
Race: White
Crime: First Degree Murder

SOURCE OF INFORMATION:

Conference with defense counsel.

PLEA NEGOTIATIONS:

HUCKLEBURY pled guilty to first degree murder in the Circuit Court for County, in exchange for a life sentence. No jury was impaneled for advisory sentence.

SENTENCE OF COURT:

Life

APPELLATE PROCEEDINGS:

Defense counsel indicated that no appeal was planned.

SUMMARY OF THE CASE:

HUCKLEBURY was hired to kill ALAN RUMMELL for the sum of $15,000.00. RUMMEL had four years previously beaten CLARENCE OWEN, an elderly man who sought revenge by hiring a murderer through a newspaper ad for a "wrestler." The victim was shot three times in a pick-up truck and dumped along the side of the road.

Conference with counsel indicated that plea negotiations were held and that HUCKLEBURY pled guilty to first degree murder in exchange for life sentence. HUCKLEBURY has no prior record.

COMMENT:

Murder for hire.

DEFENDANT:

Name: RUSSELL, COLON HENDERSON
Age: mid-30's
Race: White
Crime: First Degree Murder

SOURCE OF INFORMATION:

Conference with defense counsel.

TRIAL PROCEEDINGS:

Circuit Court, Lafayette County.

JURY RECOMMENDATION:

Life

SENTENCE OF COURT:

Life

APPELLATE PROCEEDINGS:

No appeal has yet been taken.

SUMMARY OF THE CASE:

RUSSELL shot and killed a game warden who caught him deer hunting illegally at night. He claimed self-defense, but he had shot the game warden four or five times, changed his car tires, and did not report the incident. He was traced through the car that he had been driving.

Conference with counsel indicated that the case was tried and RUSSELL found guilty of first degree murder. At the sentencing hearing, RUSSELL took the stand and stated in response to questions asked by defense counsel that he was in his mid-30's, that he had not intended to kill the game warden, and that he regretted that the game warden was dead. The jury recommended a life sentence and the Judge agreed. Defense counsel indicated that an appeal is being considered.

COMMENT:

The Court apparently discounted the aggravating circumstances of a crime committed to disrupt government law enforcement.

DEFENDANT:

Name: O'QUINN, WILLIAM
Age: 50 years (approx)
Race: White
Crime: First Degree Murder

SOURCE OF INFORMATION:

Conference with counsel.

PLEA NEGOTIATIONS:

O'QUINN pled guilty to first degree murder in the Circuit Court for Nassau County in exchange for a life sentence.

SENTENCE OF THE COURT:

Life

Life

SUMMARY OF THE CASE:

O'QUINN shot his wife between the eyes in front of their 5 children. He thought his wife had been having an affair and had threatened several times to kill her. The day he killed her, he came into the house where she and the children were eating dinner, said he had decided to kill her and asked her if she wanted him to do it outside or there in front of the children. She replied that if he was going to do it, he had better do it there and get it over with, whereupon he shot her.

Conference with counsel indicated that O'QUINN had a heart condition and could not work. Plea negotiations

were held, and O'QUINN pled guilty in exchange for a life sentence. Conference with counsel indicated that no appeal of this case is planned.

COMMENT:

This appears to be a case of premeditated and cold-blooded murder, involving a risk of death or serious injury also to the children around. The only mitigating circumstance seems to be the age of the defendant.

DEFENDANT:

Name:
Age: 27 years (approx)
Race: White
Crime: First Degree Murder

SOURCE OF INFORMATION:

Conference with counsel

PLEA NEGOTIATIONS:

Defendant pled guilty to first degree murder in exchange for a life sentence in the Circuit Court of Nassau County, Case No.

SENTENCE OF COURT:

Life; Judgment entered

APPELLATE PROCEEDINGS:

SUMMARY OF THE CASE:

was hired to kill the wife of a MR. BARBER, a millionaire in Fernandina Beach who did not want to give his wife his money in a divorce settlement. killed the wrong woman, shooting a neighbor's wife instead. The story was not unraveled until 5 years after the woman was killed.

At BARBER'S trial, the death penalty was sought, but the Judge felt that BARBER was too old and sentenced him to life in prison where he died from natural causes. Counsel for indicated that plea negotiations were held and that because BARBER had not been sentenced to death, would not be either. He pled guilty to first degree murder in exchange for a life sentence.

COMMENT:

Counsel indicated that had been in jail several times. Apparently the only reason the death penalty was not pursued in this case was that the man who had hired to kill his wife was not given the death penalty.

DEFENDANT:

Name: GENTRY, JACKIE
Age: 19 years (approx)
Race: Black
Crime: Rape of a Child

SOURCE OF INFORMATION:

Conference with counsel.

PLEA NEGOTIATIONS:

GENTRY pled guilty to the rape in exchange for life sentence,

SENTENCE OF COURT:

Life; Judgment entered

APPELLATE PROCEEDINGS:

SUMMARY OF THE CASE:

GENTRY was charged with the rape of his 6 year old niece. He broke into his sister's house where 4 children were sleeping, picked up the victim, and walked out of the house, taking her to the railroad tracks where he raped and left her nude and unconscious between the rails. He was arrested when he returned home but refused to say where the child was. The next day, 13 cars of a train ran over her before the engineer could stop the train. Extensive surgery on the victim was necessary.

GENTRY was under the influence of marijuana and alcohol at the time he attacked the child. Conference with counsel indicated that while psychiatric examination showed him to be legally sane, both prosecution and defense knew of his reputation for doing "crazy things".

DEFENDANT:

Name: BURCHFIELD, RILEY
Age: 23 years
Race: White
Crime: First Degree Murder

SOURCE OF INFORMATION:

Conference with defense counsel.

PLEA NEGOTIATIONS:

BURCHFIELD pled guilty to first degree murder in exchange for life sentence in the Circuit Court of Polk County, Case No.

SENTENCE OF COURT:

Life; Judgment entered

APPELLATE PROCEEDINGS:

Defense counsel indicated that no appeal will be taken.

SUMMARY OF THE CASE:

BURCHFIELD shot and killed his 4 year old stepson, while the child was in bed. The child's mother, BURCHFIELD'S second wife, was having an affair and BURCHFIELD had allegedly told her that if he ever caught her, he would kill her child. One night when he thought out where his wife was and talked with his wife and her family about their problems. He and his wife began fighting, the gun fell down, he picked it up, where the child was asleep, held the gun about a foot from the child's chest and pulled the trigger. He then left the house, called his sister and told her what he had done. He turned himself in to the police and fully confessed. He was indicted for first degree murder.

Defense counsel indicated that there was no insanity defense and no question of incompetence to stand trial. There was, according to counsel, tremendous community pressure for the death penalty for BURCHFIELD. He had a record of arrests for drug violations. After 3 months of pre-trial procedures, plea negotiations were held.

COMMENT:

This was clearly a case of a premeditated and cold-blooded murder of a child. No mitigating circumstances were indicated.